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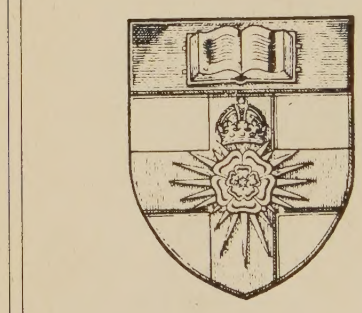

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REPORTERS.

Court of Appeal,	ROBERT D. MURRAY, G. Y. DIXON,	Barristers-at-law.
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adams, Donnelly *v.* 154, 174
Ahern and Turpin's Contract, *In re*, 85, 98
Ancketell, Harrison *v.* 25

B.

Barton *v.* M'Fadden, 472
Blacker-Douglas, Public Trustee *v.* 532, 546
Boyle *v.* Holcroft, 245
Burke *v.* Power, 119

C.

Caldwell *v.* Kilkelly, 434
Carleton, Reid *v.* 147
Carlisle *v.* Cooke, 269
Chism *v.* Lipsett, 60, 74
Close's Estate, *In re*, 207, 371
Condon, O'Brien *v.* 51
Cooke, Carlisle *v.* 269
Crean, Doyle *v.* 252

D.

David Ireland & Co., *In re*, 133
Delany and Deegan's Contract, *In re*, 602

PAGE

Donnelly *v.* Adams, 154, 174
Doyle *v.* Crean, 252
Drapes, M'Sweeney *v.* 186, 199

E.

Ely's Estate, *In re*, 413

F.

Flahavan, Kiersey *v.* 45
Foley, O'Connor *v.* 1

G.

Glynn and The Attorney-General, Vandeleur *v.* 483, 509

H.

Harrison *v.* Ancketell, 25
Harshaw, Waddell *v.* 416, 428
Hayes, Purchaser; *In re* King Harman's Estate, 448
Heeney *v.* White, 124
Henderson *v.* Henderson, 353
Herring-Cooper *v.* Herring-Cooper, 465

PAGE

Hibernian Bank, M'Mackin *v.* 296
Holcroft, Boyle *v.* 245
Hurley, Thompson *v.* 588

K.

Kiersey *v.* Flahavan, 45
Kilkelly, Caldwell *v.* 434
Kingan *v.* Matier, 272
King Harman's Estate, *In re*; Hayes, Purchaser, 448

L.

Lipsett, Chism *v.* 60, 74

M.

M'Fadden, Barton *v.* 472
M'Mackin *v.* Hibernian Bank, 296
M'Sweeney *v.* Drapes, 186, 199
Matier, Kingan *v.* 272

N.

Nicholson, Landlord; Smyth (Executors of) Tenants, 288, 607

O.

O'Brien *v.* Condon, 51
O'Connor *v.* Foley, 1
O'Donnell and Todd's Contract, *In re*, 401
O'Donnell's Estate, *In re*, 406, 409
O'Flanagan and Ryan's Contract, *In re*, 280

P.

Power, Burke *v.* 119
Public Trustee *v.* Blacker-Douglas, 532, 546

R.

Reid *v.* Carleton, 147
Ryan and O'Flanagan's Contract, *In re*, 280
Rynd's Estate, *In re*, 363

S.

Smith's Estate, *In re*; Whitestone and Harrison, Petitioners, 453, 459
———; ——— (No. 2), 460
Smith (Executors of), Tenant; Nicholson, Landlord, 288, 607

T.

Talbot Crosbie's Estate, *In re*, 236, 570
Thompson *v.* Hurly, 588
Todd and O'Donnell's Contract, *In re*, 401
Turpin and Ahern's Contract, *In re*, 85, 98

V.

Vandeleur *v.* Glynn and The Attorney-General, 483, 509
Vint & Sons, Limited, *In re*, 112

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adams, Donnelly *v.* 154, 174
Ahern and Turpin's Contract, *In re*, 85, 98
Ancketell, Harrison *v.* 25

B.

Barton *v.* M'Fadden, 472
Blacker-Douglas, Public Trustee *v.* 532, 546
Boyle *v.* Holcroft, 245
Burke *v.* Power, 119

C.

Caldwell *v.* Kilkelly, 434
Carleton, Reid *v.* 147
Carlisle *v.* Cooke, 269
Chism *v.* Lipsett, 60, 74
Close's Estate, *In re*, 207, 371
Condon, O'Brien *v.* 51
Cooke, Carlisle *v.* 269
Crean, Doyle *v.* 252

D.

David Ireland & Co., *In re*, 133
Delany and Deegan's Contract, *In re*, 602
Donnelly *v.* Adams, 154, 174
Doyle *v.* Crean, 252
Drapes, M'Sweeney *v.* 186, 199

E.

Ely's Estate, *In re*, 413

F.

Flahavan, Kiersey *v.* 45
Foley, O'Connor *v.* 1

G.

Glynn and The Attorney-General, Vandeleur *v.* 483, 509

H.

Harrison *v.* Ancketell, 25
Harshaw, Waddell *v.* 416, 428
Hayes, Purchaser; *In re* King Harman's Estate, 448
Heeney *v.* White, 124
Henderson *v.* Henderson, 353
Herring-Cooper *v.* Herring-Cooper, 465

PAGE

Hibernian Bank, M'Mackin *v.* 296
Holcroft, Boyle *v.* 245
Hurley, Thompson *v.* 588

K.

Kiersey *v.* Flahavan, 45
Kilkelly, Caldwell *v.* 434
Kingan *v.* Matier, 272
King Harman's Estate, *In re*; Hayes, Purchaser, 448

L.

Lipsett, Chism *v.* 60, 74

M.

M'Fadden, Barton *v.* 472
M'Mackin *v.* Hibernian Bank, 296
M'Sweeney *v.* Drapes, 186, 199
Matier, Kingan *v.* 272

N.

Nicholson, Landlord; Smyth (Executors of) Tenants, 288, 607

O.

O'Brien *v.* Condon, 51
O'Connor *v.* Foley, 1
O'Donnell and Todd's Contract, *In re*, 401
O'Donnell's Estate, *In re*, 406, 409

PAGE

O'Flanagan and Ryan's Contract, *In re*, 280

P.

Power, Burke *v.* 119
Public Trustee *v.* Blacker-Douglas, 532, 546

R.

Reid *v.* Carleton, 147
Ryan and O'Flanagan's Contract, *In re*, 280
Rynd's Estate, *In re*, 363

S.

Smith's Estate, *In re*; Whitestone and Harrison, Petitioners, 453, 459
———; ——— (No. 2), 460
Smith (Executors of), Tenant; Nicholson, Landlord, 288, 607

T.

Talbot Crosbie's Estate, *In re*, 236, 570
Thompson *v.* Hurly, 588
Todd and O'Donnell's Contract, *In re*, 401
Turpin and Ahern's Contract, *In re*, 85, 98

V.

Vandeleur *v.* Glynn and The Attorney-General, 483, 509
Vint & Sons, Limited, *In re*, 112

W.

PAGE

Waddell *v.* Harshaw, 416, 428
Walsh's Estate, *In re*, 261
Waterford Bridge Commissioners *v.* Corporation of Waterford, 307, 330
White, Heeney *v.* 124
Whitestone and Harrison, Petitioners; *In re* Smith's Estate, 453, 459
——— ;——— (No. 2) 460
Wills-Sandford's Estate, *In re*, 597

TABLE OF CASES CITED.

A.

PAGE

Aldin *v.* Latimer, . . . 174
Andrews *v.* Andrews, . 59, 354
Anon. (3 Leon. 71), . 149, 151
Archer *v.* Hudson, . 17, 303
Archibald *v.* Wright, 149, 151, 152
Armstrong's Estate, *In re*, 229, 230
Ashton, In the Goods of, 354, 359, 360
Attorney-General *v.* Cullen, 54, 58, 59
——— *v.* Hall, . 121
——— *v.* Portsmouth (Corporation of), . . 511, 512
Australian Navigation Co. *v.* Smith, ... 26
Aylesford *v.* Morris, . . 10

B.

Bainbrigge *v.* Browne, . . 303
Baker *v.* Bradley, . . . 303
Balfe *v.* Halpenny, . . . 51
Banister, *In re*, . . . 99
Baring *v.* Abingdon, . 172, 175
Barkshire *v.* Grubb, . 168, 175
Barton *v.* Briscoe, . . . 72
——— *v.* Jayne, . . . 34
Bateson's Estate, *In re*, . 462, 463
Bayley *v.* Great Western Railway Co., . 168, 174, 175, 178
Beattie *v.* Cordner, . . 42, 43, 592
Beaufort (Duke of) *v.* Swansea (Mayor of), . . 490, 491, 512
Bent *v.* Cullen, . . . 456
Bermingham *v.* Bourke, . . 592
Bernard *v.* Hungerford, 186, 188, 189, 191, 192, 205
——— *v.* Minshull, . . 47
Bethell *v.* Abraham, . . 549

PAGE

Bettesworth and Richer, *In re*, 422, 425
Biss, *In re*; Biss *v.* Biss, 190, 194
Blackburn *v.* Stables, . . 468
Blandford (Marchioness of) *v.* Duchess of Marlborough, . 468
Blewitt *v.* Roberts, . . . 457
Blight *v.* Hartnoll, . . . 456
Boyle *v.* Boyle, . . . 121
——— *v.* Holcroft, . . 437, 446
Bradshaw *v.* Jackman, . . 120
Brandon *v.* Robinson, . . 265
Brenan *v.* Boyne, . 67, 74, 76, 79
Brereton *v.* Tuohey, . . 198
Brett *v.* Cumberland, . . 326
Brew *v.* Haren, . 491, 511, 512
Brewer, *In re*, . . . 217
Bromley *v.* Holland, . . 127
Brown *v.* Alabaster, 165, 166, 169, 176
——— *v.* Brown, . . . 549
Buckler's Case, . . . 66
Bunbury's Estate, *In re*, . 414
Buswell's Estate, *In re*, . . 414
Butcher *v.* Pooler, . . . 138
Butler *v.* Smith, . . . 10, 108

C.

Canadian Land Co., *In re*, . 137
Castlehow, *Re*, . . 549, 560
Chambers, *In re*, . . . 72, 75
Chancellor *v.* Webster, . . 404
Charter *v.* Charter, 354, 355, 357, 358
Chesterfield *v.* Jansen, . . 10
Chinnery *v.* Evans, . . 592, 594
Church *v.* M'Poyle, . . 237, 243
Clancy *v.* Byrne, . 171, 174, 176
Clarke *v.* Malpas, . . . 17
Cloak *v.* Hammond, 355, 357, 359, 360

PAGE
Cochrane *v.* O'Beirne, . . 137
Cocks *v.* Manners, . . . 121
Coey *v.* Pascoe, 186, 188, 189, 190, 198, 205
Cogan *v.* Duffield, . 468, 469, 471
Colclough's Estate, . 461, 462, 463
Collins *v.* Shirley, . . 26, 34, 38
Colne Valley and Halstead Railway, ... 547
Commissioner of Public Works (Cape Colony) *v.* Logan, 215, 332
Constable's Case, . . . 491
Cooper *v.* Cooper, . . . 410
——— *v.* Whittingham, . . 478
Courtenay *v.* Gallagher, . . 456
Coventry and Dixon's Case, 142, 144
Cowell *v.* Taylor, . . . 26
Cropper *v.* Smith, . . . 26
Crozier *v.* Crozier, . . . 80

D.

Dalton *v.* Angus, ... 165
Darlington *v.* Hamilton, 90, 93, 94
Davies *to* Jones and Evans, . 149
Davis *v.* Angel, . . . 47
——— *v.* Marlborough (Duke of), 127
——— *v.* Tollemache, . . 74
Dawson *v.* Higgins, 356, 357, 358
Dean *v.* Dean, . . . 265
Detmold, *In re*; Detmold *v.* Detmold, ... 265
Dickens *v.* Shaw, . . 514, 560
Dicks *v.* Yates, 137, 142, 143, 146
Dillon *v.* Reilly, . . . 121
Dodd *v.* Burchell, . . . 175
Doe d. Allen *v.* Allen, . . 355
—— d. Hiscocks *v.* Hiscocks, . 355
—— *v.* Robinson, . . . 80
Donoughmore *v.* Forrest, 11, 108
Doody *v.* Nolan, 2, 8, 9, 22, 24, 98, 102, 105, 109, 111
Doran *v.* Moore, . . 26, 31, 34
Doyle, *Ex parte*, . . . 26
Doyne's Traverse, *In re*, . . 213
Dugdale, *In re*; Dugdale *v.* Dugdale, . . . 265, 267
Dunne *v.* Knowles, . . 237, 243
Durell *v.* Prichard, . . . 478
Dyson *v.* Hornby, . . . 26

E.

Earle *v.* Bermingham (No. 2), 419, 421 425, 426, 428, 431, 432, 433
Ebbs' Estate, *In re*, . . 592
Ecroyd *v.* Coulthard, . 247, 248
Edwards *v.* Thompson, . 549, 560
Egmont's Estate, *In re*, . 367, 368
Ely's Estate (No. 1), . . 414
Espey *v.* Lake, . . . 303
Espinasse *v.* Luffingham, . 149
Evans *v.* Walsh, . 188, 194, 203
Ewart *v.* Cochrane, . . 171, 174

F.

Fanning *v.* Fricker, . . 121
Fearnside *v.* Flint, . 592, 594, 595
Feltham's Trusts, *In re*, 355, 357, 359
Fenton *v.* Nevin, . . . 54, 55
Fetherstonhaugh *v.* Hagarty, 247, 248, 437, 438, 447
Finch *v.* Finch, . . . 592
Fitzgerald *v.* Firbank, . . 248
———— *v.* Fitz Gerald, . 75
———— *v.* Ryan, . . . 47
Fleetwood, *Re*, . 51, 53, 54, 56, 58
Flood *v.* Flood, . . 355, 358
Forster's Estate, *In re*, . . 457
Foulkes *v.* Jackson, . . 81, 84
Fromow, *Re*, ... 547
Fry *v.* Lane, ... 10
Fulton *v.* Templeton, . 237, 243
Fursaker *v.* Robinson, . . 10

G.

Gabbett *v.* Lawder, 189, 193, 203
Gayford *v.* Moffatt, . . . 164
Gearns *v.* Baker, 247, 248, 437, 447
Geery *v.* Reason, . . . 478
Geraghty *v.* M'Cann, 174, 176, 178, 181
German *v.* Chapman, . . 478
Gillman *v.* Murphy, 7, 9, 11, 18, 98, 105, 108
Givan *v.* Moffit, . . . 237
Glave *v.* Harding, . . . 174
Goodbody's Estate, *In re*, 363, 366, 368, 371
Goodhart *v.* Hyett, . . 438
Goodtitle d. Pearson *v.* Otway, 149, 150, 152
Grant *v.* Grant, . . 354, 355
——— *v.* Sligo Harbour Commissioners, ... 327
Great Northern Railway Co., *Ex parte*, ... 548
Greene *v.* Greene, . . . 71, 75
Grosvenor Hotel Co. *v.* Hamilton, 174

PAGE
Guilfoyle, *Re*, . . . 26
Gurney *v.* Oranmore, . . 43
Guy *v.* O'Hagan, . . . 367

H.

Halsey *v.* Brotherhead, . . 128
Hamilton *v.* Attorney-General, 512
Hanbury *v.* Jenkins, . . 440
Harenc's Estate, *In re*, . . 414
Harris and Rawlings' Contract, *Re*, ... 603
Harris *v.* Harris, . . . 47
Harrison *v.* Kirk, . . . 43
Hartnell *v.* Ryde Commissioners, 327
Hayden, *Re*, ... 8, 9
Healy *v.* Healy, . . . 355
Heath *v.* Chadwick, . 26, 35, 38
——— *v.* Wickham, . . 75, 84
Hemphill *v.* M'Kenna, . . 332
Henry's Estate, *In re*, 462, 463, 464
Hetley *v.* Hetley, . . . 53
Hicks *v.* Ross, . . . 217
Higgins *v.* Lord Mayor of Dublin, 214
Higinbotham *v.* Holme, . . 265
Hinchcliffe *v.* Kinnoul, 164, 174, 178
Hindson *v.* Ashby, . . 440
Hone *v.* O'Flahertie, 124, 127, 128, 130, 132
Hopkins *v.* Great Northern Railway Co., 321, 323, 330, 331, 345, 346
Horner *v.* Swaine, . . . 72
Hornsey Local Board *v.* Monarch Investment Society, 419, 421, 427, 428, 429, 430, 431, 433
Howe *v.* Lord Dartmouth, . 547
Hoy *v.* Master, . . 149, 150
Hubert *v.* Parsons, . . 468, 471
Hughes and Ashby's Contract, *Re*, ... 90
Hume *v.* Bentley, . . 90, 93, 98
Huxtable, *In re*, . . . 53
Hynes *v.* Redington, . . 468

I.

Incorporated Society *v.* Richards, 20
Ingham *v.* Rayner, . . 356, 360
Inland Revenue Commissioners *v.* Glasgow and South-Western Railway Co., . 214, 381, 383
International Tea Stores Co. *v.* Hobbs, . . . 170, 175
Irish Land Commission *v.* Davies, 462
Isaac *v.* Hughes, . . . 75

J.

PAGE
Jackson and Verner *v.* Irvine, . 237
Jeffryes *v.* Evans, . . 247, 447
Joel *v.* Mills, ... 265
Johnson *v.* Ball, . . . 54, 56
Johnson, *In re*; Sly *v.* Blake, 419, 428, 431
Johnston *v.* O'Neill, . . 47

K.

Kavanagh *v.* Crowley, . . 106
Kay *v.* Oxley, . 168, 169, 172
Kaye *v.* Fosbrooke, . . 26, 34
Keech *v.* Sandford, . . . 194
Kemmis' Estate, *In re* (No. 1), 207, 211, 217, 223, 225, 377, 392, 414
——————— (No. 2), 211, 224, 225
Kempson *v.* Ashbee, . . 303
Kent *v.* Stoney, . 198, 204, 205
Kevans *v.* Joyce, . . . 10
King *v.* Stacey, . . . 100

L.

Ladd *v.* O'Toole, . . . 378
Lambert's Estate, *In re*, . . 70, 74
Lambton *v.* Parkinson, . . 137
Lamphier *v.* Drapes, . . 79
Langley *v.* Hammond, 167, 168, 169, 171
Leader's Estate, *In re*, 207, 211, 212, 214, 217, 218, 223, 224, 228, 234, 372, 374, 375, 376, 377, 378, 381, 387, 388, 389, 391, 392, 397, 398
Leahy *v.* De Moleyns, . . 592
Leamy *v.* Waterford and Limerick Railway Co., 319, 321, 329, 332, 345
Leigh *v.* Burnett, . . . 193
Lett *v.* Randall, . . . 457
Letton *v.* Goodden, . . . 328
Liford's Case, . . . 437, 442
Lloyd *v.* Hatham Station Brick Co., ... 26
London and South-Western Railway Co. *v* Gomm, . 580, 586
Londonderry Bridge Commissioners *v.* M'Keever, . 320, 328
Lyme Regis (Mayor, &c., of) *v.* Henley, ... 326
Lyons and Carroll's Contract, *Re*, 90
Lytle *v.* Fox, . 188, 190, 194, 195

M.

M'Clintock *v.* Irvine, . . 76, 79

PAGE

M'Cormack *v.* Courtney, . . 8, 9
M'Cormick *v.* Grogan, . . 54
M'Grath *v.* Ahern, . . . 8
M'Vicker's Contract, *In re*, . 93
Maitland *v.* Irving, . . . 303
Major *v.* Auckland, . . . 26
Manifold *v.* Johnston, . . 93
Manning *v.* Saul, . . . 108
Mansergh *v.* Campbell, . . 456
Marsh and Earl Granville's Contract, *In re*, 90, 94, 96, 98, 99, 100, 107, 111
Maxwell's Will, *In re*, 149, 150, 152, 153
Mayn *v.* Mayn, . . . 468
Meares *v.* Redmond, . . 8, 110
Megginson *v.* Harper, . . 592
Metropolitan Bank *v.* Pooley, 26, 43
Miller *v.* Travers, . . . 356
Morgan *v.* London and North-Western Railway Co., . . 214
——— *v.* Morgan, . . 456, 457
Motion *v.* Moojen, . . . 26
Moss *v.* Cooper, . . . 56
Mulcaire *v.* Lane-Joynt, . 7, 9, 19
Muller *v.* Trafford, . . 190, 198

N.

Nannock *v.* Horton, . . 150
Nash's Settlement, *In re*, 255, 260
National Provincial Bank of England and Marsh, 90, 93, 98, 604
Newton *v.* Cubitt, . . . 328
New Windsor Corporation *v.* Taylor, . . . 330, 345
Nicholl *v.* Allen, . . 325, 342
Nixon's Estate, *In re*, . 462, 464
Noble's Trusts, *In re*, . . 355
Nowlan *v.* Walsh, . 149, 152, 153

O.

Oakden *v.* Pike, . . . 90
O'Connor *v.* Foley, . 102, 106, 303
Ohrby *v.* Ryde Commissioners, 328
Olphert *v.* Olphert, . . . 255
Owen, *In re*, . . . 428, 431
Owen's Estate, *In re* (No. 1), . 414
——————— (No. 3), 213, 372, 394, 395

P.

Palmer *v.* Locke, . . . 72
Parkinson, *In re*, . . . 213

PAGE

Paton *v.* Ormerod, . . . 47
Payne *v.* Partridge, . . . 322
Pearson *v.* Spencer, . . 174
Pegler *v.* White, . . . 603
Penfield *v.* M'Murdo, . . 592
Pennock *v.* Pennock, 149, 150, 151
Pentland's Estate, *In re*, 366, 367, 368
Perry *v.* Merritt, . . . 151
Pheysey *v.* Vicary, . 174, 176, 178
Pickard *v.* Sears, . . . 507
Pilkington *v.* Gore, . 188, 196, 203
Pitt *v.* Donovan, . . . 128
Pomfret *v.* Ricroft, . . 437, 442
Postlethwaite *v.* Lewthwaite, 186, 188, 189, 196, 197, 203, 204
Potter *v.* Bradley, . . . 404
Powell *v.* Powell, . . . 303
Pyer *v.* Carter, . . . 166
Pyrke *v.* Waddingham, . . 603

R.

R. *v.* Cambrian Railway Co., . 321
— (Blackburn) *v.* Down (Justices of), ... 479
— (Clitheroe) *v.* Dublin (Recorder of), ... 475
— *v.* Essex (County Court Judge of), ... 478
— *v.* Wall, ... 575
Radcliffe *v.* Bewes, . . . 75
Randall *v.* Russell, 189, 190, 191, 193
——— *v.* Willis, . . . 468
Rankin *v.* M'Murtry, . 1, 7, 8, 9
Rea *v.* Joyce, ... 10, 19
Regent's Canal Iron Works Co., *In re*, ... 113, 116
Reid *v.* Atkinson, . . . 52
—— *v.* Shergold, . . . 74
Reith *v.* Seymour, . 149, 151, 152
Rhodes *v.* Dawson, . . . 26
Rice *v.* Rice, . . . 24, 118
Richardson *v.* Murphy ([1899] 1 I. R. 248), 247, 474, 475, 476, 478
——— *v.* ——— ([1903] 1 I. R. 227), . . . 121
Ricketts *v.* Lewis, . . . 410
Riordan *v.* Banon, . . . 54
Roberts *v.* Karr, . . . 171
Robinson *v.* Dusgate, . . 152
——— *v.* Montgomeryshire Brewery Co., . . 113, 117
Roche *v.* Roche, . . . 468
Rochfort *v.* Battersby, 26, 36, 39, 40, 41, 42
——— *v.* Hackman, . 265, 267
Rossiter *v.* Rossiter, . . 168
Ryland's Estate, *In re*, . . 366

S.

PAGE
Sackville-West *v.* Viscount Holmesdale, . . . 467
Scott and Alverez's Contract, 90, 98, 99, 604
Scott *v.* Brownrigg, . . 53
—— *v.* Redmond, . . . 8
Seale Hayne *v.* Jodrell, . . 355
Sercombe *v.* Sanders, . 303, 307
Shelley's Case, . . 467, 472
Shepherd *v.* Keatley, . . 93
Sherratt *v.* Mountford, . . 356
Sims *v.* Quinlan, . . . 121
Slator *v.* Nolan, . . . 7
Smith *v.* Giddy, . . . 248
—— *v.* Robinson, . . . 100
—— *v.* Whitmore, . . 90
Somerville, *Re*, . . . 26
Stamford (Earl of) *v.* Hobart, . 467
Stebbing *v.* Metropolitan Board of Works, ... 214
Steele *v.* Tiernan, . . 247, 478
Stevenson *v.* Parker, . . 9
Stewart *v.* England, . . 592
Stinson's Estate, *In re*, . . 462
Stokes *v.* Heron, . . . 456
Stonor *v.* Curwen, . . . 468
Stuart *v.* Kennedy, 60, 71, 72, 74, 75
Sullivan *v.* Sullivan, . . 52, 53
Sutton *v.* Sutton, . 592, 594, 595
Sutton Harbour Co. *v.* Hitchens, 137
Swanton's Estate, *In re*, . . 462

T.

Taggart *v.* Taggart, 468, 469, 471
Taylor *v.* Russell, . . . 8
Tevlin *v.* Gilsenan, . . 410
Thomas *v.* Owen, . . 172, 175
PAGE
Thomson's Estate, *In re*, 150, 151
Thornber *v.* Sheard, . 303, 304
Tichborne *v.* Weir, 1, 8, 9, 19, 20, 22
Tidwell *v.* Ariel, . . . 137
Tildesley *v.* Harper, . . 26
Tollemache's Estate, *In re*, . 229
Tottenham Local Board *v.* Rowell, 422, 425
Trumper *v.* Trumper, . 190, 193

V.

Venn *v.* Furze's Contract, . 410
Vickery *v.* Deane, . . . 462

W.

Waddell *v.* Wolfe, . . . 90
Wade's Estate, *In re*, . . 462
Wakefield *v.* Smythe, . . 404
Walsh's Trusts, . . . 74
Ward *v.* Dyas, 252, 254, 255, 257, 258, 260
Warder *v.* Saunders, . . 26, 44
Warren *v.* Richardson, . . 93
Watson *v.* Watson, . . . 410
Watts *v.* Kelson, . . 169, 171
Wearing *v.* Ellis, . . . 26, 40
Webb *v.* Grace, . . . 265
Wells *v.* Wells, . . . 356
Wilde *v.* Watson, . . . 133
Wilkins *v.* Jodrell, . . . 457
Witt *v.* Corcoran, . . . 137
Wolverton Mortgaged Estates, 355, 359, 360
Woodin *v.* Glass, . . . 47, 49
Woodside *v.* Massey, . . 237
Wright *v.* Vanderplank, . . 303

CORRIGENDA.

Page 25, the names of *Ronan, K.C.*, *R. F. Harrison, K.C.*, and *W. M. Whitaker*, counsel for the defendants, R. H. Wallace and T. A. Warnock, were inadvertently omitted.

,, 452, last line, *after* "*Kerr*" *read* "*Johnston.*"

,, 500, line 14, *for* "1805" *read* "1806."

CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1905.

O'CONNOR *v.* FOLEY.

(1902. No. 1137.)

M. R.
1904.
Feb. 19, 25, 26, 27.
Mar. 2, 3, 19.

Landlord and tenant—Assignment without consent of landlord—7 Geo. 4, c. 29, s. 3—Statute of Limitations, effect of—3 & 4 Wm. 4, c. 27, s. 34—Covenant for further assurance—Unfair transaction—Undue influence—Setting aside mortgage.

The effect of the Statute of Limitations upon the position of a person in possession of leaseholds (not an assignee) is not to transfer to him the interest of the lessee, and make him bound by the covenants in the lease, but merely to give him the right of possession during the remainder of the lease against the lessee or those claiming under him.

Tichborne v. *Weir* (67 L. T. (N. S.) 735) followed. *Rankin* v. *M'Murtry* (24 L. R. Ir. 290) considered.

A covenant for further assurance by a settlor in a marriage settlement, by which a lease is assigned without the consent of the lessor (contrary to the statute 7 Geo. 4, c. 29, s. 3), is not void, although the assignment of the lease is void, and can be enforced against the settlor if he becomes a "present

M. R. 1904.

O'CONNOR v. FOLEY.

tenant" of the lands, and so gets rid of the restraint upon alienation imposed by the statute; and an agreement by him to assign the lands to another person, though for value, will not prevail against the beneficiaries under the settlement.

Doody v. *Nolan* (2 L. R. Ir. 199) distinguished.

Beneficiaries under a settlement were induced by relatives, by whom they had been brought up, to sign promissory notes given by the relatives to a creditor, and under pressure of legal proceedings to assign their interest in the settled lands, which were in the possession of the relatives, to enable them to mortgage the lands to the creditor.

The beneficiaries were only just of age, ignorant of their rights, and without any effective legal advice:—

Held, that the transaction was procured by undue influence, and was unfair, and that the assignment and mortgage should be set aside.

TRIAL OF ACTION.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

The lands of Ardmonick and Knockea, in the county of the city of Limerick, which are the subject of the present action, were demised by lease of October 5th, 1827, by Edward Villiers, to John Synan, his heirs and assigns, to hold to him, his heirs, executors, and administrators, from the 30th April, 1827, for the lives of Edward Croker, eldest son of John Croker, then aged fifteen years, and John Synan, third son of the lessee, then aged about thirteen years, and George Gough, eldest son of George Gough, of Woodstown, then aged about sixteen years, and during the life of the longest liver and survivor of them, and for the term of thirty-one years, to be computed from May 1st, 1827, subject to the yearly rent of £250.

The date of this lease brings it within the statute 7 Geo. 4, c. 29, s. 3, which provided that where lands are held by virtue of a lease executed after June 1st, 1826, not containing a clause expressly authorizing the lessee to assign and sublet, it shall not be lawful for such lessee, his executors, administrators, or assigns, to assign or sublet, without the express consent of the lessor, testified, where the assignment or subletting is by deed or written instrument, by his written indorsement on such deed or instrument . . . and every deed or instrument whereby such assignment or subletting shall be made without such consent . . . shall

be and be deemed wholly void and invalid to all intents and purposes whatsoever.

On January 25th, 1855, by endorsement on this lease, Edward John Synan, the assignee of the estate and interest of John Synan, the lessee, assigned it without the consent of the lessor to Hugh O'Connor, in consideration of the sum of £300.

By a settlement of September 30th, 1876, executed on the occasion of the marriage of Hugh Henry O'Connor (son of Hugh O'Connor) and Mary Fennelly, after reciting the said lease, and that the premises became subsequently legally vested in Edward John Synan, son of the said John Synan (the lessee), and the assignment from Edward John Synan to Hugh O'Connor, Hugh O'Connor conveyed to Robert Frewen and Daniel Quilty the said lands of Ardmonick and Knockea (amongst other lands and premises), to hold upon trust for himself for life, then for Hugh Henry O'Connor for life, then for Mary Fennelly for life, and after the death of the survivor, in trust for the children of the marriage, in such shares as the survivor of them (Hugh Henry O'Connor and Mary Fennelly) should by deed or will appoint, and in default of appointment, in trust for all the children in equal shares, if sons on attaining twenty-one years of age, if daughters on attaining that age, or marrying under it, with consent of their guardian. By this settlement Hugh O'Connor covenanted for title and for further assurance. The power of appointment was not exercised.

Hugh Henry O'Connor died on August 6th, 1881, leaving his wife and four children surviving. One child (Joseph) died under age on April 16th, 1895. Mary Fennelly, otherwise O'Connor, died on April 6th, 1882. Three children survived her, namely, William B. O'Connor, who was born on July 2nd, 1877; Henry O'Connor, born September 14th, 1878, and John O'Connor, born January 7th, 1880. William attained age on July 2nd, 1898; Henry on September 14th, 1899, and John on January 7th, 1901. Hugh O'Connor, the father of Henry Hugh O'Connor, survived his son, and died in 1896. In 1889 Lucy O'Connor, daughter of Hugh O'Connor, married Patrick Foley, and they resided thenceforth at Knockea with her father, Hugh O'Connor, and her three nephews, the plaintiffs, to whom she and her husband stood *in*

M. R. 1904.

O'Connor v. Foley.

loco parentis after the death of their grandfather, Hugh O'Connor. He purported to make a settlement upon her marriage with Patrick Foley. He had, in 1873, mortgaged the lands to Mary Bradshaw. In 1881 (15th August) the mortgage was transferred to Henrietta O'Connor; and in 1886 (15th August) Henrietta O'Connor, then a nun, transferred the mortgage to Lucy O'Connor, who was her sister.

The arrangement in 1888 (by agreement of September 19th) was that, in consideration of the marriage, and a sum of £300, the fortune of Patrick Foley (which was needed to clear the rent of Knockea, then under eviction), the farm, &c., was to be assigned to Patrick and Lucy Foley, subject to the landlord's assent, which was obtained in January, 1889. No actual assignment to Patrick and Lucy Foley was executed; but there was a good equitable contract for a transfer, so far as Hugh O'Connor was in a position to make one.

Meanwhile, on the 7th December, 1888, Hugh O'Connor obtained an order under the Land Law (Ireland) Acts, 1881 and 1887, fixing a fair rent of £171 15*s.*, instead of £250, and making the holding a present tenancy.

In addition to the above, it is only necessary to state the following facts, which are referred to in the judgment:—

Patrick Foley became indebted to the defendant Fitt, an auctioneer, for advances on promissory notes, renewed from time to time, which were signed by his wife, Lucy Foley, his mother, Bridget Foley, and his brother, Daniel Foley, as sureties. The plaintiffs, who were informed of their rights under the settlement, were induced by Patrick Foley to sign the notes. Two of them were just of age; the third was a minor. In July, 1901, the liability upon the notes amounted to £942 4*s.* 5*d.*, for which the defendant Fitt issued a writ against all the parties to the notes. On July 26th, 1901, an agreement was made between the Foleys, the plaintiffs, and Fitt, that the interest in the lands of Knockea and Ardmonick, occupied by Patrick Foley, should be conveyed by all parties interested, namely, Patrick Foley, and the plaintiffs, to Lucy Foley, she to give a mortgage of the lands to Fitt, in consideration of the debt due to him by the Foleys and the plaintiffs. In pursuance

of this agreement, by deed of August 1st, 1901, made between Patrick Foley of the first part, the plaintiffs of the second part, and Lucy Foley of the third part, Patrick Foley assigned as beneficial owner, and the plaintiffs confirmed to Lucy Foley the said lands, and by deed of the same date, made between Lucy Foley and Fitt, Lucy Foley covenanted to pay the sum of £957 due on foot of her promissory notes, and the sum of £91 14*s.* 5*d.*, due by Patrick Foley, and charged the said lands with payment of the said amounts, and covenanted to execute a legal mortgage to Fitt when required.

The plaintiffs having become aware of their rights, instituted this action on December 13, 1902, against Lucy Foley, Patrick Foley, Bridget Foley, Daniel Foley, Robert Frewen, William B. Fitt, and the Munster and Leinster Bank, and claimed—(1) To have the trusts of the settlement of September 30th, 1876, carried into execution, and an account taken of the property subject to the trusts of the said settlement. (2) That the defendants, Lucy Foley and Patrick Foley, might be declared bailiffs of the lands and stock on the said lands comprised in the said settlement, from May 29th, 1896 (the date of the death of Hugh O'Connor), for the plaintiffs, and ordered to account for the profits thereof. (3) That the agreement of June 26, 1901, and the deed of August 2nd, 1901, should be set aside and declared void, and the promissory notes held by William B. Fitt delivered up to be cancelled.

Robert Frewen was made a defendant as surviving trustee of the settlement of 1876. The Munster and Leinster Bank were made defendants in respect of a deed of charge, dated February 10, 1894, from Patrick and Lucy Foley. The Bank put in a defence, alleging, amongst other things, that an order had been made on June 23, 1902, by the Vice-Chancellor, in a suit in which the Bank were plaintiffs, and Patrick Foley and Lucy Foley defendants, declaring the said deed of charge well charged upon the estate and interest of Patrick Foley and Lucy Foley at the date of the said deed. This action was afterwards dismissed, as against the Bank, for want of prosecution, so no question arose as to this deed of charge.

Statements of defence were put in by Lucy Foley and Patrick

M. R. 1904. O'Connor v. Foley.

Foley, and also by Fitt. The substance of the defences was that the settlement of 1876 was void for all purposes, the landlord's consent not having been obtained to the assignment purported to be made by it by Hugh O'Connor, who held the premises under the lease of 1827. That by agreement of September 19th, 1888, made on the marriage of Lucy O'Connor and Patrick Foley, Patrick Foley agreed to maintain Hugh O'Connor during his life in consideration of his agreeing to assign the lands; that by order of the Irish Land Commission, dated December 7th, 1888, Hugh O'Connor was declared a tenant of a present ordinary tenancy in the lands; that by writing under his hand, dated December 31st, 1888, Hugh O'Connor agreed to assign all his interest in the lands to Patrick and Lucy Foley, or to a trustee to be named by them; and that the landlord by writing under his hand, dated 12th January, 1899, consented that the lands should be assigned to Patrick Foley; that, in pursuance of this agreement, Patrick Foley entered into possession and paid the rent, and maintained Hugh O'Connor during the rest of his life.

The defendants also alleged that even if the plaintiffs had an interest in the lands, they parted with that interest with full knowledge of their rights, and submitted that the agreements and deeds sought to be impugned should not be set aside.

The plaintiffs, by way of reply, alleged—(1) that Hugh O'Connor, and those claiming under him, were estopped from disputing the validity of the settlement; (2) that assuming that Hugh O'Connor executed the settlement contrary to the statute of 7 Geo. 4, the effect of the order making Hugh O'Connor a present tenant was to free the lands from the restriction against alienation, and that the lands became liable to the trusts of the settlement, which was made for valuable consideration; (3) that Hugh O'Connor was not assignee of the lands, inasmuch as the assignment of 20th January, 1855, from Edward Synan to him, was void for want of consent of the lessor; that in 1875 he had acquired a good title to the lands under the Statute of Limitations against everyone but the lessor or his successor in title; that the interest acquired by Hugh O'Connor under the Statute of Limitations was not subject to the provisions of the statute 7 Geo. 4, c. 29, s. 3, or to any of the covenants in the lease; that the settlement

bound the interest of Hugh O'Connor in the lands, and that the present tenancy in the lands acquired by Hugh O'Connor by the order of the Irish Land Commission became subject to the trusts of the settlement.

The trial took place before the Master of the Rolls on February 19 and subsequent days, when witnesses were examined on behalf of the plaintiffs and the defendants; the purport of their evidence, so far as it is material, is stated in the judgment.

O'Connor, K.C. (*Moriarty, K.C.*, with him), for the plaintiffs:—

It is contended that the assignment of the lease purported to be made by the settlement of 1876 was void under the statute of 7 Geo. 4, c. 29, s. 3, the consent of the lessor not having been obtained; but if it was void, according to the law laid down in *Gillman* v. *Murphy* (1) and subsequent cases, that did not affect the covenant for future assurance by Hugh O'Connor, which was an independent covenant. It bound him when he acquired a disposable interest in the lands, as he did when he got a fair rent fixed, to assign that interest to the trustees of the settlement, or to declare a trust for the plaintiffs, the beneficiaries under it: Dart on Vendors and Purchasers, 6th Ed., vol. ii., p. 909. The agreement to assign the lands to Lucy Foley cannot prevail over the plaintiffs' rights under the settlement.

The transactions to which the plaintiffs were parties cannot stand. The defendant Fitt had notice of the settlement, and the plaintiffs were ignorant of their rights, and had no independent advice when they signed the deeds: *Slator* v. *Nolan* (2).

C. F. Doyle, for the defendants, Patrick and Lucy Foley:—

The lease of 1827 was within the operation of 7 Geo. 4, c. 29, s. 3, which made an assignment impossible without the consent of the landlord. The son of the original lessee purported to assign to Hugh O'Connor, but there is no evidence that the landlord assented to that assignment. Assuming, therefore, that he was not legal assignee, yet, by virtue of the Statute of Limitations, he acquired the lessee's interest: *Rankin* v. *M'Murtry* (3); *Mulcaire* v.

(1) I. R. 6 C. L. 34. (2) I. R. 11 Eq. 367. (3) 24 L. R. Ir. 290.

M. R. 1904.

O'Connor v. Foley.

Lane-Joynt (1); *M'Cormack* v. *Courtney* (2); *Re Hayden* (3); *Tichborne* v. *Weir* (4) may be relied on, but the Irish cases were not cited.

By the terms of 7 Geo. 4, c. 29, the settlement was void. The section says:—"Every deed whereby such assignment shall be made without such consent as aforesaid shall be and be deemed wholly void and invalid to all intents and purposes:" *Meares* v. *Redmond* (5). The consent of the landlord may be indorsed on the deed at any time, but it does not operate retrospectively: *M'Grath* v. *Ahern* (6). The covenant for further assurance falls with the deed; there is no distinction in that respect between a dependent and an independent consent; but this covenant is dependent: *Doody* v. *Nolan* (7).

There can be no specific performance of a covenant for further assurance, if no estate is conveyed: Platt on Covenants, p. 353. The deed cannot amount to a declaration of trust binding on Hugh O'Connor. Patrick Foley got the legal estate, and is in a better position than the plaintiffs: *Taylor* v. *Russell* (8).

[On the facts, he submitted that the plaintiffs had not made out a case of fraud or pressure.]

Conner, K.C., and *Poole*, for the defendant Fitt:—

The statute 7 Geo. 4, c. 29, s. 3, is more stringent than 2 Wm. 4, c. 17, and 22 & 23 Vict. c. 145, s. 10. It forbade assignment without the express consent of the landlord, unless there was a clause in the lease expressly authorizing assignment. There is no such clause in the lease here. Fitt is the assignee of the Foleys; and if they had an interest which they could assign, he has a good charge. Hugh O'Connor was in possession since 1855, and was assignee of the lease, if the consent of the landlord had been obtained, as to which there is no evidence; or, if not, he has acquired a title to the lease under the Statute of Limitations: *Rankin* v. *M'Murtry* (9). The settlement of 1876 was void: *Doody* v. *Nolan* (7); *Scott* v. *Redmond* (10). The consent of the

(1) 32 L. R. Ir. 683.
(2) [1895] 2 I. R. 97.
(3) [1904] 1 I. R. 1.
(4) 8 T. L. R. 713; 67 L. T. 735.
(5) 4 L. R. Ir. 533.
(6) 20 L. R. Ir. 341.
(7) 2 L. R. Ir. 199.
(8) [1892] A. C. 244.
(9) 24 L. R. Ir. 290.
(10) 8 L. R. Ir. 112.

landlord to an assignment within 7 Geo. 4, c. 29, s. 3, cannot be presumed: *Stevenson* v. *Parker* (1). Estoppel does not apply here any more than it did in *Gillman* v. *Murphy* (2). The covenant for further assurance was only ancillary to the assignment, and must fall with it. It cannot be enforced now against the Foleys, who acquired the new interest under the fair rent order for valuable consideration.

[On the facts, they submitted that no undue influence or pressure had been brought to bear on the plaintiffs by Fitt.]

Moriarty, K.C., in reply:—

The effect of the provisions of 7 Geo. 4, c. 29, s. 3, and 22 & 23 Vict. c. 154, s. 10, is the same: Cherry's Land Acts, 3rd ed., p. 30. As regards the effect of the Statute of Limitations, *Tichborne* v. *Weir* (3) expressly decides the point, which the Irish cases cited do not. It was held in *Tichborne* v. *Weir* (3) by the Court of Appeal that a person who had been in possession of leasehold premises for the statutory period, but had no legal assignment of the lease, was not liable for breach of a covenant to repair. The ground of this decision was that the effect of the statute was merely to extinguish the right of the lessee, and not to transfer his estate to the party in possession. In *Rankin* v. *M'Murtry* (4), Holmes, J., held that the interest of the lessee vested in the party in possession, but the other Judges decided the case on different grounds. No such point was decided in *Mulcaire* v. *Lane-Joynt* (5), nor in *M'Cormack* v. *Courtney* (6). *Re Hayden* (7) was an *ex parte* application, and *Tichborne* v. *Weir* (3) was not cited. Applying *Tichborne* v. *Weir* (3) here, Hugh O'Connor was in lawful possession for over twenty years in 1876, with a good title, save against the landlord, and, therefore, he had an interest which he could convey.

But the covenant for future assurance makes it unnecessary to labour this point. *Doody* v. *Nolan* (8) is not an authority that a covenant for future assurance falls with a void assignment. The

(1) [1895] 2 I. R. 504.
(2) I. R. 6 C. L. 34.
(3) 67 L. T. 735.
(4) 24 L. R. Ir. 290.
(5) 32 L. R. Ir. 683.
(6) [1895] 2 I. R. 97.
(7) [1904] 1 I. R. 1.
(8) 2 L. R. Ir. 199.

M. R. 1904. O'Connor v. Foley.

covenant in that case was to deliver up possession free from incumbrances. May, C.J., there says, at p. 212, that the covenant was merely ancillary to the transfer of the farm, but that if it could be regarded as a covenant for title, the case would be different. The passage cited from Platt on Covenants, at p. 353, is at variance with other passages in that work, viz. 373, 577. In *Fursaker* v. *Robinson* (1) the deed was invalid, because there was no entry, and it was a voluntary deed. The covenant for further assurance is like a covenant for title, and is independent. A purchaser might file a bill to enforce a covenant for further assurance: Sugden's Vendors and Purchasers, 14th ed., p. 612; Dart's Vendors and Purchasers, p. 909. Hugh O'Connor was, therefore, bound when he acquired a fresh interest under the fair rent order to make good his covenant for further assurance. Foley's claim is for valuable consideration, but with notice.

On the facts of the case he submitted that the Foleys were not innocent purchasers; they were bound to protect the interests of the plaintiffs, and they took advantage of the law to defeat those interests: the transaction was unfair, and the parties were not able to contract on equal terms. On this point he referred to *Chesterfield* v. *Jansen* (2); *Fry* v. *Lane* (3); *Aylesford* v. *Morris* (4); *Rea* v. *Joyce* (5); *Kevans* v. *Joyce* (6); Kerr on Fraud, p. 175.

Cur. adv. vult.

March 19.

The Master of the Rolls (after stating the facts of the case as above) proceeded as follows:—

Inasmuch as the lease of 1827 was within the provisions of 7 Geo. 4, c. 29, s. 3, and did not contain any clause expressly authorizing assignment, and as no consent to any assignment was obtained from the landlord prior to 1889 (January 12), the settlement of 30th September, 1876, was ineffectual to transfer the lessee's interest; for the section is in terms identical with the 10th section of the 23 & 24 Vict. c. 154, on which *Butler* v. *Smith* (7),

(1) Prec. Ch. 475; also reported in Gilb. Eq. Rep. 139, the authority referred to in Platt at p. 353, note (*o*).
(2) 2 Ves. 125; 1 Wh. & T. 289.
(3) 40 Ch. D. 312.
(4) L. R. 8 Ch. App. 484.
(5) 29 L. R. Ir. 525.
(6) [1896] 1 I. R. 442.
(7) 16 Ir. C. L. R. 213.

Donoughmore v. *Forrest* (1), *Gillman* v. *Murphy* (2), and similar cases have been decided. Therefore, as the plaintiffs claim under that settlement, the defendants deny their title altogether, and rely on the Foley settlement for theirs.

The plaintiffs sue to have the transaction to which I shall presently refer set aside on the ground of fraud or undue influence. Now, supposing a man is induced by fraud of any sort to execute a deed conveying property, it is no answer to him in this Court to say, "That may be so; but you have sustained no damage because there was a flaw in your title." He has a right to defend his title if he can; and it is an actionable wrong to induce him by improper means to deprive himself of the means of doing so. It is argued, however, that if the plaintiffs here had no title, their suit would fail in substance, so far as the right to an injunction was concerned; and probably that is so. There are therefore two questions to determine, viz. (1), Are the plaintiffs entitled to have the impeached transactions set aside? and (2), if so, what consequences flow from that right?

Pat Foley, a man of no character (save such as may belong to one convicted of burning his business premises in order to defraud an insurance company) was ostensibly the tenant of Knockea. In Hugh O'Connor's lifetime the plaintiffs, and a brother who died under age, were taken in to live with their grandfather, both their parents being dead. "More miserable creatures you would not find anywhere" is their description by Foley. Their aunt, Lucy Foley, was kind to them, and acted almost a mother's part by them. She said she was a mother to them. It would be strange if this did not influence their minds, and it did; they were fond of her, and ready to do anything for her. Pat Foley was not prosperous either as a farmer or in his business as a small trader in Limerick. Mr. Fitt, one of the defendants, is an extensive auctioneer in Limerick, where it is the practice for farmers to sell stock and produce by auction late in the season, the auctioneers making cash advances on bills or promissory notes with sureties early in the year, and recouping themselves with interest out of the proceeds of the sales. In this way Patrick Foley became largely indebted

(1) I. R. 5 C. L. 443. (2) I. R. 6 C. L. 34.

M. R. 1904. O'Connor v. Foley.

to Fitt on bills or notes, renewed from time to time, until the total liability amounted up to above £1000. In 1896, '97, '98, and '99, the notes were unsecured except by Lucy Foley the wife (with the exception of a transaction for £35, secured by Bridget Foley the mother). Afterwards further security was required; and one Daniel Horan joined as maker of promissory notes in 1900 amounting to about £835. In 1903 Bridget Foley and Timothy Foley (mother and brother of Patrick Foley) joined as sureties to the amount of £1043 4*s.* 5*d.*, together with one John Hourigan.

About this time Bridget Foley became apprehensive as to this large liability, and refused to renew the notes, unless the O'Connors, that is, the plaintiffs, joined, about which apparently they made no difficulty. They had no money, and knew nothing of their having any rights in connexion with the farm on which they lived, or under any marriage settlement. They did not know there had been any settlement at all on their parents' marriage. William, the eldest, was and had been for some years studying, with the view of ultimately entering the priesthood, at an establishment where he was educated and supported gratuitously. Henry was a farm labourer for Pat Foley, receiving his keep for his work. John was a shop-boy in Pat Foley's little shop in Limerick. William appears to be the most intelligent of the three, and, though but imperfectly educated, knew more, I believe, of the nature of a bill of exchange than he was willing to admit. Still, he was little more than a schoolboy at the time, ignorant of affairs, and had no real knowledge of his position or the consequences of what he was doing. A labouring man named Kennedy, who was not examined, told some of the brothers that he believed they had some claim to the place (Knockea), and I think that William had some idea that this was so—though what the claim was he did not know. Henry was not told anything by Kennedy till after he had signed the notes. It was all vague and uncertain.

William O'Connor's account of the transaction is as follows:—"Some time after my grandfather's death I heard rumours about my having some claim. It was definite in 1901. I had no communication with the Foleys till 1898 or 1899, in my brother Joe's lifetime. He was in Mungret when I first signed the notes of 1899; I think in the summer of 1898 Patrick Foley came one

morning, and asked me to see William B. Fitt. I went to Fitt's office. The clerk was there and produced papers. Patrick and Bridget Foley and my brother John were there. They gave us papers to sign, and we signed them on blue paper. Foley told me it did not matter; it was only to please Fitt. I was not told what I was signing. John signed, too. He was not then of age."

Henry O'Connor's account is: "I was carried into Fitt's office by Foley's mother with Foley. Foley's wife told me I was going to sign a document for Fitt; she was constantly at me, and made me do it; I did not want to do it. She said it would please Fitt. I knew they had dealings, but did not know they owed any money. The only thing I knew was what Kennedy told me, that my father owned the place, and we should have some claim on it. This was after the bill being signed. Patrick Foley did not go with me to Fitt's. The clerk was there. He reached me the document, and told me to sign it (a green one); I signed the document that day. They told me nothing about it, but to sign it. (Document produced.) I never read it, and did not know the substance of it at all. I did not sign any more than one."

Henry struck me as being very ignorant, and by no means intelligent. His aunt, Lucy Foley, described him as "sulky, and a person you would not think of making a confidant of"; and she is a very clever and well educated person.

John O'Connor says:—"I know that my brother Joseph was alive at the time the bills were signed. On August 8th, 1900, I was under age. Foley asked me to sign, himself and his mother. They told me to go to Fitt's office to sign bills." He went and did so.

At the time of signing the first of these bills (August 8th, 1900) William was twenty-three; Henry over twenty-one; and John was a minor, and, of course, not bound by the transaction.

The notes were renewed; and, finally, in July, 1901, the liability on the notes amounted to £942 4*s.* 5*d.*, for which Fitt issued his writ against all the parties.

During these proceedings the plaintiffs here acted without advice, save the persuasion of the Foleys, whom they desired to serve. They acted in ignorance of their position; they believed

M. R. 1904. O'Connor v. Foley.

what they did was a mere matter of form "to please Fitt," and to serve their aunt Lucy. There never were three persons who more needed advice. They were undertaking a liability for a relatively immense sum for not one penny of which were they in any way answerable. If any friend had knowledge of the facts, he would have told them to sign no paper; to let the Foleys become bankrupt if they could not pay, and claim the farm themselves. If they had done this, supposing their claim was good, they could have made what provision they chose for the Foleys afterwards, and if it was not good, their suffering a judgment would be of no use to the Foleys. John was incapable of being bound by the transaction, Henry knew and understood almost nothing about it, and William very little. John was entirely under the influence of Pat Foley; indeed he was got to take a sham transfer of Foley's business, in Limerick, his name being put over the door. Foley, however, remained the real owner, and emptied the till two or three times a day. John was tried with Foley for arson, but was acquitted, and I entirely accept the conclusiveness of the verdict, which, of course, is not in any way questionable in this case.

On the service of the writ, the whole family was in commotion and consternation. The one idea was to "settle." Foley said "the only proper thing was to come to a settlement."

William O'Connor, on the 22nd July, 1901, went to Mr. Kearney, solicitor, bringing the writ with him, and had several interviews with him that day. He was (Mr. Kearney said) in "great distress" about it. Mr. Kearney knew nothing about any marriage settlement at the time, though he had a "floating idea" that the O'Connors had some sort of claim. He first heard of the settlement from some of the Foleys, and was in no position to advise or assist.

Mr. Kearney was very loth to have anything to do with the transaction, for obvious reasons; but he did draw up a form of agreement. He never saw John O'Connor, and only once saw Henry, who came merely as a messenger. He could not understand William's motive or object in assigning away the property, though he appeared to him to be "academically" clever, and was dressed in the clothing of one intending to take orders. Patrick Foley was unwilling that Mr. Kearney should be consulted,

alleging for excuse that he was "slow," and that he was a "man of law," and wanted law, and not a settlement.

Then came the agreement of 26th July, 1901. It was made between Patrick Foley, Lucy Foley, William, Henry, and John Francis O'Connor, Mrs. Bridget Foley, Timothy Foley, Daniel Foley, and William B. Fitt. It was proposed and agreed that the interest in the lands of Knockea and Ardmonick, occupied by Patrick Foley, be conveyed by all parties interested, viz. Patrick Foley, William, Henry, and John Francis O'Connor, to Mrs. Lucy Foley, wife of Patrick Foley, the entire interest to vest in her; Mrs. Lucy Foley, on her part, to grant a mortgage of the said lands to William B. Fitt, in consideration of the debt due to him by Patrick Foley, Lucy Foley, William, Henry, and John O'Connor, and Mrs. Bridget Foley.

The accounts of what passed on the preparation and execution of this document are so numerous and, to some extent, conflicting, that I do not mean to give them *in extenso*. The evidence which I believed left on my mind the conviction that Henry and John knew substantially nothing about it, save that it was something intended as a settlement of the writ; that they had absolutely no advice in the matter; and that they yielded to the influence of the Foleys, and were solely influenced by it, without knowledge of their rights, or of the effect of what was done on them.

As to William, the case is not so strong, for though he, too, acted in ignorance, and from an untutored impulse to serve his aunt—he knew not well how—he had Mr. Kearney's advice (not founded on any actual knowledge) not to sign, followed by Mr. Kearney ceasing to have anything more to say to the case. But he did not know what he was giving up. It "might have been £100, or it might have been £1000," for all he knew. The thing was hurried through with extraordinary haste. As to all these plaintiffs the matter was improvident; so grossly improvident as almost to amount to insanity.

The deeds which followed and completed the agreement are of no higher validity than the agreement itself. They were prepared by Mr. Fitt's solicitor, who (under protest, no doubt) acted for William O'Connor as well. I regret that he did not adhere to his objection to occupy that position. He had procured

M. R. 1904.

O'Connor v. Foley.

on the 27th July a copy of the lost settlement; and he ought not to have allowed either party for whom he was acting to execute any irrevocable disposition till he had fully mastered all the facts of the case, and explained it to them in all its bearings, not alone to William O'Connor, but to his brothers also. The result is that the plaintiffs, whom Mr. Fitt's clerk called "these little boys," were got to sign away everything they had in the world, for a debt not their own; and that they, who were asked to do something as sureties for a surety for the real debtors, find themselves in the position and with the liabilities of principal debtors. Mr. Dodds did not even inquire as to the ages of the clients whom he never saw.

Apart, then, from the questions whether their title to Knockea was good or bad, can these transactions stand? Mere improvidence will not necessarily vitiate a settlement or gift. But when, as here, you find not alone extreme improvidence, but absence of knowledge of rights, extreme pressure (under the writ), ignorance of law (the plaintiffs were not aware that John's infancy was a defence to the writ), poverty, influence, such as the Foleys, by reason of their *quasi*-parental relations, indubitably possessed over them; and the absence of any effective legal advice; it is impossible to say that the parties to the contract were on a footing of equality, or that the dealing was such as this Court could allow to stand.

The general principles are not in dispute. They are to be found in Kerr on Fraud, 2nd ed., p. 153, where the result of the authorities is thus stated:—"The rule of equity with respect to dealings between guardian and ward is extremely strict, and imposes a general inability on the parties to deal with each other. Where the relation of guardian and ward is subsisting between two parties, if a gift, or anything of the nature of a gift, proceeds from the ward towards the guardian, when the ward has just come of full age, such transactions are subject to be received with the utmost jealousy by Courts of Equity. It is almost impossible that transactions of such a nature can be sustained, unless the party claiming the benefit of the gift can show, to the satisfaction of the Court, that his influence has not been misapplied in the particular transaction. Unless it appears to be a spontaneous act

on the part of the ward, or unless he be informed in all the particulars of the nature, character, and probable consequence of his proceeding, such a transaction cannot stand." *Archer* v. *Hudson* (1) is the leading authority. And at p. 158—"The principle on which a Court of Equity acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the variety of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, and where confidence is reposed and betrayed." And again, the rule as to inadequacy of consideration is thus stated at p. 160—"Mere inadequacy of consideration or inequality in a bargain is not ground to set aside a transaction, if the parties were on equal terms, and in a situation to judge for themselves, and performed the act wittingly and willingly. Mere inadequacy of consideration is not a ground for refusing specific performance of an unexecuted contract, and still less can it be ground for rescinding an executed contract. But inadequacy of consideration, if it be of so gross a nature as to amount in itself to conclusive and decisive evidence of fraud, is a ground for cancelling a transaction. In such cases the relief is granted, not on the ground of the inadequacy of consideration, but on the ground of fraud, as evidenced thereby."

In *Clarke* v. *Malpas* (2), Knight Bruce, L.J., said:—"The seller was a man in humble life, imperfectly educated and unable of himself to judge of the precautions to be taken in selling, or of the mode of sale, or of the mode of recovering the price which was not at once paid down. He was helpless in the matter, without advice, without protection. Now, in the transaction only one solicitor was employed; and though the evidence may be conflicting, I am perfectly satisfied, without meaning any reflection on Mr. Cooper, that if Mr. Cooper was not the solicitor of the purchaser alone in the matter, he was more the solicitor of the purchaser than of the seller." Applying this to the present case, one might read here Mr. Dodds for Mr. Cooper. Again, he says:—"So that not only

(1) 15 L. J. Ch. 211.
(2) 4 D. F. & J. 403.

M. R. 1904. O'Connor v. Foley.

was there completion at an undervalue, which alone might be nothing, but there was completion under circumstances of gross imprudence, on terms on which the seller ought not to have been allowed to complete. It does not appear that Cooper called attention to any of these considerations. No counterpart, or copy of the conveyance, was kept for the seller; he was left helpless. If he had been bred to the law, if he had had the advantages of education, the case might have stood differently."

The contracts here were not fair nor equal; the parties were not on an equal footing in respect of those essentials which go to validate an agreement; and advantage was taken of immaturity of age and want of knowledge, for the benefit of older, more experienced, and cleverer people.

Again, the rule is that in the application of the principles of the Court there is no distinction between the case of one who himself exercises a direct influence, and of another who makes himself a party with the person who exercises the undue influence: Kerr, p. 168. These are legal commonplaces—truisms, which constitute the very life-breath of our system of equity.

But the defendants rely upon their second line of defence, which is this:—The lease to Synan in 1827 contained no clause authorizing alienation. It therefore came within the statute I have referred to (7 Geo. 4, c. 29, s. 3), and so nothing passed to the trustees of the settlement of September, 1876.

This appears to me unanswerable. The words "it shall not be lawful," which logically led to the almost grotesque result of *Gillman* v. *Murphy* (1), are the words of the section in question also. If so, there was no conveyance by Hugh O'Connor, and the lands remained in him. He was, therefore, able to enter into the agreement of 19th September, 1888, after which a fair rent was fixed by Hugh O'Connor, and the leasehold interest converted into a statutory tenancy, free from the restrictions under the Act of George. Indeed, the landlord appears to have given a written assent, though not as required by the statute.

The plaintiffs' answer to this is—admitting that nothing passed to Hugh O'Connor by virtue of his assignment from Synan in

(1) I. R. 6 C. L. 34.

1855—he was in possession, paying rent for a period prior to 1888, more than enough to give him a title by the Statute of Limitations, so that before the Foley settlement he had acquired an interest, which was bound in his hands by his contract; and as, by the settlement, he covenanted for further assurance, he had thereby disabled himself in equity from giving any inconsistent interest, or derogating from his grant.

The reply to this contention was two-fold. First, it was argued for the defendants that the title acquired by Hugh O'Connor by the statute was simply a title to the leasehold interest as assignee thereof; and, secondly, that even if not, the covenant for further assurance, or the covenant to be implied by the execution of such a settlement, even for the highest consideration, was simply part and parcel of the assignment of the lease itself; and as the assignment is void, so also are the covenants contained in it.

The first of these questions is one of considerable difficulty, and has led to much divergence of judicial opinion. That the statute should confer a title as against any other claimant to the leasehold interest is plain enough; but that the landlord, who has received his rent all along, should be bound by the unlawful intrusion, so as to lose the benefit of any of his rights as they stood under his demise, is a different question. If the statute worked as an assignment of the lease, then the occupant, as lawful assignee, should, it is said, be bound by its terms as between him and the lessor.

The very able judgments in *Rankin* v. *M'Murtry* (1) consider, though it was not necessary there expressly to decide, this question; and the same may be said of *Mulcaire, Tenant; Lane-Joynt, Landlord* (2). Mr. Justice Madden seems to have approved, in *In re Hayden* (3), of the argument of counsel to the effect that the Statute of Limitations vested the lessee's interest in the person entitled to the benefit of it, notwithstanding that the language of the section is only "no action shall be brought."

But the case of *Tichborne* v. *Weir* (4) was not there cited.

(1) 24 L. R. Ir. 29.
(2) 32 L. R. Ir. 643.
(3) [1904] 1 I. R. 1.
(4) 67 L. T. (N. S.) 735.

M. R. 1904. O'Connor v. Foley.

Tichborne v. *Weir* (1) was a case decided, in 1892, by a very strong Court of Appeal in England, the Judges being Lord Esher and Lords Justices Bowen and Kay. The action was for breach of a repairing covenant. The defendant, whose title, as assignee of the lease, was alleged by the landowner to be shown by his having occupied without assignment during a period which gave him a title as against the lessee, on the theory that the statute effected an assignment—a theory mainly based on language used by Lord St. Leonards in *The Incorporated Society* v. *Richards* (2), that by the statute, "when the remedy is barred, the right and title . . . of the real owner are extinguished, and are, in fact, transferred to the person whose possession is a bar." The Court, however, held differently. Lord Esher says, at p. 736:—"The real point argued before us in this case is, whether sect. 34 of the Act of 3 & 4 Wm. 4, c. 27, has transferred the lease formerly held by Baxter to Giraud, who for over twenty years had been in possession of the land without any acknowledgment to Baxter, who had equitably mortgaged the lease to him. The question is, whether Giraud became subject to the covenants in the lease, and whether he has assigned the lease to the defendant. If the statute transferred the lease to Giraud, then Giraud became tenant of the landlord, whether the landlord liked it or not. Reliance was placed on the words of the section, though it says not a word about transferring anything to anybody; it merely says that the right 'shall be extinguished.' If that is all, the right of the man out of possession is extinguished, so that he cannot eject the man who is in possession; but nothing is given to the latter by the statute. As no one can turn out the man in possession, his possession is the same in effect, as Lord St. Leonards says, as if he had a title conveyed to him. But it is argued that cases have decided that a title is transferred by the statute. It is not said that there is any reported case which clearly decides that Giraud became under the statute a transferee of the lease; but it is contended that Judges have used words which show that such is the case. The plaintiff relies on phrases used by Lord St. Leonards, a very great real property lawyer; but they were used when he

(1) 67 L. T. (N. S.) 735. (2) 1 Dr. & W. 289.

was speaking of a fee-simple, and when no question was raised as to a lease. The opinions of well-known writers of conveyancing text-books are also opposed to the contentions put forward on behalf of the plaintiff. Hayes, in his own marginal note, says in his book on Conveyancing (vol. 1, 6th ed., p. 269) :—'The statute does not convey but destroys the right.' Therefore, the matter comes to this: the words of the statute do not carry the proposition which is contended for: the reason of the thing is against it; there is an absence of judicial authority, and the views of well-known text-book writers are uniformly against it. All these reasons show that the effect of the statute is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed. That being so, the judgment of Cave, J., is right, and this appeal must be dismissed."

Bowen, L.J., says :—"I am of the same opinion. It seems to me that the whole of the argument addressed to us depends on the proposition that the statute transferred Baxter's rights and liabilities as against the landlord to Giraud. I think that the statute makes no transfer of any kind." Later on he quotes the following passage from Dart's Vendors and Purchasers, 6th ed., vol. 1, p. 463 :—"Possession for a time exceeding the statutory limit not only bars the remedy, but also extinguishes the right of the original owner. It has been said that the effect of the Act is to make a parliamentary conveyance of the land to the person in possession after the statutory period has elapsed; but though it is true that the possessory owner, after the statutory limit has been passed, is placed by the Act in a position analogous to that which he would have occupied if the fee-simple had been absolutely conveyed to him, yet his title under the Act is acquired solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. If the statute operated as a sort of involuntary alienation of the estate of the rightful owner, the adverse possessor would take it subject to the subsisting charges; and whenever it was in settlement his interest therein would constantly be varying according to the successive limitations of the settlement; but this is clearly not the operation of the statute." I need not read more. Kay, L.J., concurred. Both he and Bowen, L.J., agreed that the action could not be maintained

M. R. 1904.

O'Connor v. Foley.

against a person whose only title was statutory. They also held that the defendant was not estopped from denying that he was assignee of the lease.

This is a point-blank decision, in a case where the question had to be determined, that the Statute of Limitations does not operate to transfer the leasehold interest which is its subject, so as to carry on a covenant even to repair. I am bound to follow *Tichborne* v. *Weir* (1), and the less reluctantly because I concur in its reasoning. I cannot understand how a statute which extinguishes the right of a person who has been out of possession for a specified time can effect more without a transfer of his title, with all its incidents and obligations, to another.

It is in my opinion clear, having regard to *Tichborne* v. *Weir* (1), that the consequences of the absence of a clause authorising alienation in the lease of 1827 were not carried on against Hugh O'Connor, he not being assignee; and that therefore the restraint on alienation had ceased the moment the statutory bar arose.

The second reply is that when the assignment of the lease to Hugh O'Connor was made, and was void *in toto*, all the incidents and provisions of the lease were void as being unlawful, *in toto*; and so the covenant for further assurance, and any implied covenant or obligation depending upon it, went by the board, including the covenant for further assurance; and this argument is mainly based on *Doody* v. *Nolan* (2).

The action there was on a covenant in a marriage settlement to deliver up certain lands to the plaintiff. The defendant pleaded that the lands were held by him under a lease forbidding assignment, that the deed of settlement was subsequent to 23 & 24 Vict. c. 154, s. 10; and that the landlord had not given his consent to the assignment, and that the deed was null and void, and the covenant also null and void. The Court of Appeal held (Christian, L.J., dissenting) that the covenant was dependent on the deed and fell with it, and that the defendant was not estopped from pleading the illegality. Ball, L.C., in giving judgment, says:—"The covenant is from the father of the husband to deliver the lands (thus illegally granted) to the trustees of the settlement, free from

(1) 67 L. T. (N. S.) 735. (2) 2 L. R. Ir. 199.

all incumbrances save the trusts by the settlement created. It cannot, however, be considered by itself. Its nature, character, and effect also very much depend upon the other provisions and objects of the settlement, which I, therefore, proceed to consider." Having considered these, he says :—"Now, if the direct object aimed at —namely, actual assignment of the leasehold—be illegal, how can the indirect intention to effect the same purpose be legal? . . . . Here the actual assignment is by the Landlord and Tenant Act, 1860, declared to be unlawful. The covenant is practically that the covenantor shall do this same unlawful act, or what is equivalent to it. The declaration of the statute operates to render the assignment unlawful. Its policy, manifested in this declaration, forbids that a covenant to procure this unlawful act to be done shall be enforced; and if it does, the necessary result follows, that damages cannot be allowed for an act not being done which the tribunal to award them itself forbids."

May, C.J., says :—"If the trustees acquired no right to any interest in this farm—if Nolan the elder was entitled after that date to treat them as trespassers and recover possession from them, supposing them to have obtained possession—it seems to me that the covenant by the defendant to give up possession to the trustees on the 1st March, 1875, must fall to the ground. I think that this obligation to deliver possession must be intended to arise only in case the trustees under the trusts and limitations of the deed should be entitled to such possession. This covenant was, I think, merely ancillary and accessory to the principal operation which the parties intended the deed to have, namely, the transfer of the farm to the trustees upon the trusts of the settlement."

Now it is, I should think, plain that the section of the Subletting Acts and of the Landlord and Tenant Act, 1860 (sect. 10), though rendering the assignment absolutely and for all purposes invalid, cannot have meant to invalidate the entire of any deed in which such an unlawful assignment is contained. Take the case of a conveyance of two properties, one subject to a clause against alienation, and the other held under a free title. It could not be contended, I suppose, that the assignment of the latter would be void, on account of a section which applies only to the former. But the defendants say this covenant is purely ancillary to the

M. R. 1904.

O'Connor v. Foley.

conveyance which is "not lawful." That is not so. A covenant for further assurance binds not only the interest then existing in the grantor, but any estate he may afterwards acquire in the same lands. I put it to counsel during the argument, supposing the covenant had been one by the grantor to use his best endeavours to procure the landlord's assent to the assignment, would that be "unlawful"? The Act of George 4 plainly contemplates that the landlord's assent may be given after the assignment, it says, "by written endorsement." No answer was offered to this suggestion. I think it obvious that this would be a perfectly valid compact, even if the assent were withheld by reason of the assignor refusing to endeavour to obtain it. I regard that covenant as wholly independent of the result; and equally, or indeed *a fortiori*, a covenant for further insurance. In *Doody* v. *Nolan* (1) the covenant was to give possession, and was construed as intending to apply even if the landlord refused his assent, that is, against his will; and thus it was a contract to do what the law says is illegal, not by way of conveyance, but by delivery of possession.

In my opinion this covenant for further assurance bound the intended assignor Hugh O'Connor; did not fall with the assignment; and was in equity an obligation compelling him, when he could, to validate his settlement. He could have done this the moment he obtained his fair rent order; and, except by a conveyance for value without notice, he could not get rid of it. But as the defendants' title is only an equitable one (by agreement), it is, the equities being equal, *puisné* to the title of the plaintiffs. No superior equity, as in *Rice* v. *Rice* (2), was suggested.

For these reasons I think the plaintiffs are entitled to succeed, and to the decree they seek.

Solicitor for the plaintiffs: *John O'Dwyer.*
Solicitor for the defendants: *F. M. Fitt.*

W. L.

(1) 2 L. R. I. 199. (2) 2 Dr. 73.

HARRISON *v.* ANCKETELL.

(1902. No. 372.)

M. R.
1904.
Nov. 8, 9, 25.

Arranging debtor—Right to sue—Official assignees—Right to property—Vesting of estate—Locus standi—*Bankruptcy—Staying proceedings.*

An action to set aside a mortgage transaction affecting property in which the plaintiff claimed an interest was brought by an arranging debtor, and a statement of claim was delivered. By resolution, accepting the proposal in the arrangement matter, it was provided that the plaintiff should pay twenty shillings in the pound on all his unsecured debts and engagements. The payment was to be secured by vesting the plaintiff's estate in the official assignees as trustees, with power, in default of lodgment, to realize the estate. After payment of costs and creditors' claims out of the proceeds, the surplus was to be paid to the plaintiff. Default was made in carrying out the arrangement. An order for realization was made, and a vesting certificate issued and registered. The official assignees were not parties to the action, which was commenced after the default and vesting order. After delivery of defence and reply an application was made by one of the defendants to stay the proceedings. The fact of the plaintiff being an arranging debtor was not stated in the pleadings:—

Held, that the plaintiff had no *locus standi* to carry on the action, and that the proceedings therein should be stayed.

O'Connor, K.C. (with him *Wilson, K.C.*, and *Arthur C. Meredith*), for the defendants Guedalla and Baker, applied for an order staying the proceedings in the action, and asking alternatively that these defendants might be at liberty to amend their defence by pleading that all the estate and interest of the plaintiff in the matters in question became and are now vested in the official assignees in bankruptcy, and that the plaintiff be ordered to give security for costs.

The circumstances of the case are fully explained in the judgment.

Matheson, K.C., Molony, K.C., and *T. S. M'Cann*, for the plaintiff.

M. R. 1904.

HARRISON v. ANCKETELL.

D. M. Wilson, for C. R. Cordner, one of the trustees of the Harrison estate.

R. D. Megaw, for Annie Young, executrix of another of the trustees of the Harrison estate.

The following authorities were cited:—*Collins* v. *Shirley* (1); *Heath* v. *Chadwick* (2); *Kaye* v. *Fosbrooke* (3); *Major* v. *Auckland* (4); *Rochfort* v. *Battersby* (5); *Dyson* v. *Hornby* (6); *Molion* v. *Moojen* (7); *Metropolitan Bank* v. *Pooley* (8); *Warder* v. *Saunders* (9); *Tildesley* v. *Harper* (10); *Lloyd* v. *Hatham Station Brick Company* (11); *Cowell* v. *Taylor* (12); *Doran* v. *Moore* (13); *Re Somerville* (14); *Re Guilfoyle* (15); *Ex parte Doyle* (16); *Rhodes* v. *Dawson* (17); *Cropper* v. *Smith* (18); *Australian Steam Navigation Company* v. *Smith* (19); *Wearing* v. *Ellis* (20); and counsel referred to Bankruptcy Act, 1857, sections 267, 268, 304, 349; Bankruptcy Act, 1872, sect. 65; Baldwin on Bankruptcy (1904 ed), pp. 345–347; Judicature Act, sect. 27, sub-sect. 5: Order XXV., Rr. 2, 3, 4.

Nov. 25.

THE MASTER OF THE ROLLS:—

The action was commenced by writ of summons of the 19th April, 1902, the statement of claim being launched in the following July. Mr. Henry Harrison is the sole plaintiff, and there are a number of defendants, two of them being Mr. Florence Montefiori Guedalla and Mr. John W. Baker. The statement of claim is a very long and elaborate document, which covers over forty pages of print, and impeaches a mortgage transaction affecting property in which the plaintiff claims an interest; but I need not go

(1) 1 Russ. & Mylne, 638.
(2) 2 Ph. 650.
(3) 8 Sim. 28.
(4) 3 Ha. 77.
(5) 2 H. L. Cas. 388.
(6) 7 D. M. & G. 1.
(7) L. R. 14 Eq. 208.
(8) 10 App. Cas. 210.
(9) 10 Q. B. D. 114.
(10) 10 Ch. D. 393, 397.
(11) 85 L. T. 158.
(12) 31 Ch. D. 34.
(13) 16 L. R. Ir. 181.
(14) 1 L. R. Ir. 293.
(15) 15 L. R. Ir. 238.
(16) 7 I. L. T. R. 172.
(17) 16 Q. B. D. 548.
(18) 26 Ch. D. 700.
(19) 14 App. Cas. 318.
(20) 6 D. M. & G. 596.

into it further, because apart from the question of the status of the plaintiff, and his right to sue, it discloses a cause of action, which he is entitled to have litigated. The defence of Mr. Guedalla and Mr. Baker was delivered on the 19th November, 1902. The plaintiff delivered his reply on 24th November, 1903.

This application is brought forward at a late stage of the case. The notice of motion of the 25th October, 1904, asks "(1) That the proceedings herein be stayed on the ground that the plaintiff has no *locus standi*, all his estate and interest (including the alleged cause of action herein) having become and being now vested in the official assignees in bankruptcy. (2) Alternatively, (*a*) that the said defendants be at liberty to amend their defence, delivered herein on the 19th day of November, 1902, by adding thereto, as a further defence to this action, the defence that all the estate and interest of the plaintiff in the matters in question herein (including his alleged cause of action) before action became and are now vested in the official assignees in bankruptcy; (*b*) that the plaintiff be ordered to give security for costs."

The plaintiff filed a petition for arrangement in bankruptcy on 7th December, 1896. A protection order was made on the same day. By resolution of 5th February, 1897, accepting the proposal in the arrangement matter, it was provided that the plaintiff should pay twenty shillings in the pound on all his unsecured debts and engagements, by lodging with the official assignee within two months from the confirmation of his proposal, or within such extended time as the Court might allow, a sum sufficient to pay same, such payment to be secured by vesting the plaintiff's estate in the official assignees as trustees, with power, in the event of default in lodgment of the money, to realize the estate; and, after payment of costs and creditors' claims out of the proceeds, the surplus was to be paid to the plaintiff. That resolution was adopted and confirmed by the Court, and on the 15th February, 1897, a vesting certificate was obtained and registered. The plaintiff made default in lodging the first instalment on 15th April, 1897, and on 16th July there was an order to the trustees to realize. On 30th July, 1897, a further vesting certificate was issued and duly registered. One shilling in the pound has been paid to the creditors, the balance remaining over, the total amount

M. R. 1904. HARRISON *v.* ANCKETELL.

of indebtedness being about £11,000. Both Mr. Guedalla and Mr. Baker, who reside in England, the executors of the assignee of the mortgage for £12,000, swore that they did not know of the vesting of Mr. Harrison's estate till June last, and that they then came forward with reasonable diligence to act in the matter. Neither of them has been cross-examined, and I am bound to assume that they are telling the truth, and that neither of them had any personal knowledge of the matter. I was not aware that the fact of the vesting of the property in the assignees had ever been brought before me; but on looking through the large mass of documents dealing with the litigation in reference to this estate, I find that it was brought forward, and that it is mentioned in the affidavits. But the matter did not arise before me in regard to the question of the vesting of any property, or the right of Mr. Harrison to sue. It came before me simply in reference to the carriage of proceedings. I found *Beattie* v. *Cordner* in a derelict state with no one to carry it on to a final issue; I knew from the proceedings that Mr. Harrison was willing and anxious to do so, and the carriage of the proceedings was given to him. That, of course, was not a decision in any way affecting the present question, or the legal question now raised, because the duty of a person having carriage of proceedings is usually in great part merely ministerial; and all I had to do was to get some one to lift the case out of the position into which it had sunk. The appointment of Mr. Harrison to have carriage of the proceedings here, and a similar appointment made by the Land Judge in reference to the real estate, do not decide any question as to his right to sue in the present action.

Another branch of the litigation went to the House of Lords, and something is supposed to have happened there which settled the present question. But when it is considered, what happened does not involve any decision on the point in question. There the objection was made before the Committee of Appeals that Mr. Harrison was not competent to carry on the appeal. There was argument, and the decision appeared to have overridden the objection to his *status*, but no reasons are given. There was no argument in the House of Lords itself as to his *status*. He was heard on the appeal, and the appeal was dismissed. That only

decides that he was a competent person under the circumstances to be heard on the appeal, and is a very different thing from deciding, as matter of law, that an arranging trader who has no authority from his assignees, in whom his property is vested, has power to litigate without the assignees being parties to the litigation.

The official assignees did not appear in the present proceedings. They are not parties to the action. The statement of claim does not disclose that Mr. Harrison is an arranging trader. Since the commencement of the proceedings the official assignees have been applied to in reference to the proceedings, and they very cautiously, whether prudently or not, abstained from interference, thinking perhaps that it would be time enough to intervene if the litigation resulted in any benefit to the estate.

Now, what is the effect of the arrangement proposal, acceptance, default, and vesting order, and certificate?

Section 349 of the Act of 1857 provides:—"From and after the date of the approval and confirmation of such resolution or agreement, all the estate and effects of such petitioning trader shall vest in the official assignees (if such shall be required by virtue of such resolution, and either alone or jointly with any person or persons, as may be expressed in such resolution) as fully as if such official assignees and other parties were assignees under any bankruptcy." To ascertain what is the effect and extent of a vesting in bankruptcy, we must turn to sections 267 and 268.

Section 267 refers to personal estate. It provides:—"When any person shall be adjudged a bankrupt, all the personal estate and effects of such bankrupt, present and future, wheresoever the same may be, and all property which he may purchase or which may revert, descend, be devised, or bequeathed, or come to him, before such bankrupt shall have obtained his certificate in pursuance of the adjudication made in that behalf, and all debts due or to be due to him, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt; and no such bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, neither

M. R. 1904.

HARRISON v. ANCKETELL.

shall the same be attached as the debt of such bankrupt, by any person, according to the custom of the city of Dublin or otherwise, but such assignees shall have absolute power and remedy to recover the same in their own names." That is, as regards personal estate. As regards real estate, section 268 provides:—"When any person shall be adjudged a bankrupt, all lands, tenements, and hereditaments (except copy or customary hold) wheresoever the same may be situate, to which any such bankrupt is entitled, and all interest therein to which such bankrupt is entitled, and of which he might have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt, before he shall have obtained his certificate, and all deeds, papers, and writings respecting the same, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of such bankrupt."

And section 304 provides:—"If the produce of the estate of any bankrupt shall be sufficient to pay twenty shillings in the pound, with such interest as the Court shall allow to the creditors, and to leave a surplus, the Court shall order such surplus to be paid to such bankrupt, his executors, administrators, or assigns."

Therefore, under the Act both a bankrupt and insolvent has an interest in the surplus, and, of course, the same is true in the case of an arranging debtor; and we have here in the resolution itself that provision.

Comparing the Act of 1872, section 111, and General Order (1872) CXCVII., the effect is, that the arranging debtor has parted with all his property real and personal, just as if he had been adjudicated bankrupt.

An arrangement under the Act need not necessarily comprise a vesting in the official assignees, and frequently does not. When it does, however, then it takes effect "as fully" as if in bankruptcy.

Apart from authority, it would surely be straining the language of the Legislature, or contradicting it, to hold that the vesting in arrangement is not as full as in bankruptcy. It is no fuller. It does not, without the assignees' assent, vest in them lands held

under onerous conditions, any more than in bankruptcy. But the vesting is as full, for all intents and purposes. It is not a question of merely vesting legal estates, or conferring powers of control or inspection. The property is taken from the debtor, and transferred to the assignees, whose duty, if and when there is a surplus, is the same as the duty of the official assignees in bankruptcy.

In the present case I put a question, to which I received no answer: Could Mr. Harrison, the plaintiff, compromise the action? If so, he could receive from Guedalla (say) £5,000 clear, even though his creditors would not obtain more than the shilling already paid on account of twenty shillings.

Of course, this is out of the question. The plaintiff could not be, in reality, *dominus litis* (as every other plaintiff is), else he would be a mere trustee for the assignees, who are, on his theory, trustees for him.

Mr. Harrison's counsel argued that there is a distinction; that especially in the present case, having regard to the terms of the resolution, the estate of the arranging debtor is merely pledged, as if by a mortgage, to secure twenty shillings in the pound to the creditors; and that as a mortgage on a man's property does not prevent him from suing for or in respect of it, so Mr. Harrison is in no worse position.

But this is contrary to the words of the statute. In the case of a mortgage, the mortgagor retains in equity all his property, subject only to the rights of the mortgagee. In the case of an arranging debtor, the debtor (by the vesting) parts with all he has, and retains and has nothing, till his debts are paid: that is, till a surplus is ascertained and paid, or reconveyed to him, or at least till he is in a position to call for such payment or reconveyance. Till then, the assignees, and not he, are the owners; and their duties are precisely the same as in bankruptcy, when once they have been ordered to realize.

Mr. Molony relied on a case in this country of *Doran* v. *Moore* (1), before Dowse, B., and Andrews, J., in the Exchequer Division. That case came on in this way. The plaintiff in the action was an arranging debtor, and had carried a resolution for a

(1) 16 L. R. Ir. 181.

M. R. 1904. HARRISON *v.* ANCKETELL.

composition with his creditors under the sections of the Act of 1857, which I have referred to, and by resolution it was required that all his estate and effects should vest in the official assignees and another, as a security for the creditors upon trust, in default of payment of the composition, to apply to realize the estate. The resolution was in common form.

The plaintiff, before the composition had been carried out, or he had obtained any certificate, made a lease for a term, just as if he had been *sui juris*, and as if there had been no arrangement matter. The sheriff seized, under a writ of *fi. fa.*, the goods of the plaintiff's tenant, and a quarter's rent then due under the lease was claimed from the sheriff by the plaintiff, and by the official assignees. The sheriff sold the goods, and paid the assignees. The plaintiff brought an action against the sheriff for allowing the goods to be removed without satisfying the plaintiff and a demurrer was taken, and there was also a defence setting out the arrangement and vesting of the estate in the assignees. It was held that the plaintiff was entitled to maintain the action. There was a point, which does not arise in the present case, in reference to election by the assignees so as to vest the leasehold interest in them. The question, however, of importance was as to the right of an arranging debtor to maintain an action against a sheriff for removing goods from the leasehold premises without paying the arranging debtor, under the statute of Anne, the rent due. The case seems to have been decided by Andrews, J., and I think also by Dowse, B., upon the ground that there was a personal estoppel as between landlord and tenant, notwithstanding that the landlord was an arranging debtor, and that there was nothing to transfer to his assignees in bankruptcy the plaintiff's position and rights by estoppel which were created after the vesting. No doubt Dowse, B., says, "But the main contention of the defendant was founded on the law of bankruptcy and arrangement. It will, therefore, be necessary to consider this plea a little more in detail. The plea states the petition for arrangement: and the documents referred to in it, when produced, show that the arranging trader proposed that all his property, including these premises by name, should vest in the official assignees, and a gentleman named Haslam to secure a composition of ten shillings in the

pound, payable by bills at four, eight, and twelve months. The proposal also stated that, in the event of default being made, the assignees were to be at liberty to apply to realize the property. This proposal was turned into a resolution, and, having received the proper support of the creditors, became binding on them. Then, by sections 349 and 350 of the Bankruptcy and Insolvency (Ireland) Act, 1857, all the arranging trader's property, including these premises, became vested in these assignees as if they were assignees in bankruptcy. There is no doubt of this. But I am of opinion that the property so legally vested was to be held by the assignees on the trusts stated in the proposal and resolution. It is plain from the dates that default has been made, the arrangement is still pending, and Doran has not received his certificate."

The point in this case did not arise there at all; and the few words used extrajudicially by Baron Dowse as to the effect of the arrangement and vesting must be taken with the words—"It is also plain, for if it were not so, it ought to have been stated in the pleading, that no application has been made to the Court by the assignees for liberty to realize the estate. For this simple reason I must hold the plea to be bad, as it shows no authority in the assignees to interfere in this matter in the way they have done. But I shall go further. Even if this was a case of bankruptcy pure and simple, I can find no authority that will justify assignees in bankruptcy in acting as the assignees have done here. It is unquestionably the law that contracts made by a bankrupt before he obtains his certificate can be adopted by his assignees. There must be some limitation to this rule. Contracts purely personal, such as a contract of marriage, cannot be adopted; and I am inclined to hold that contracts under seal, such as a lease, as in this case, cannot be adopted by the assignees in the way done here." The judgment of Andrews, J., rests the case on the true ground. He says:—"I assume, on the facts alleged in the pleadings, that under the 349th section of the Bankruptcy Act of 1857, the premises in question vested in the assignees as fully as if they were assignees under a bankruptcy, subject, of course, to the specified trusts; but there was nothing in the plaintiff's proposal, and there is nothing in the Act, to transfer to the assignees the plaintiff's position and rights by estoppel, as Tierney's

M. R. 1904.

HARRISON v. ANCKETELL.

landlord, which were created after the vesting; which, by leaving the plaintiff in possession of the premises, the assignees enabled him to create, and which still subsist."

But if the opinion of Dowse, B., were more clear than it appears from *Doran* v. *Moore* (1) to have been, that opinion was formed without serious consideration of the authorities bearing on the present question, which, indeed, were not cited, because, probably, they were deemed irrelevant.

It is true that there is some dearth of authority in reference to cases of arrangement, but there is no lack of it as to insolvency; and, of course, as to bankruptcy, the case is too clear for argument.

Now, how does it stand in cases of insolvency?

I need not go back prior to 1830. In that year Shadwell, V.-C., in *Collins* v. *Shirley* (2), held that in a foreclosure suit the mortgagor, an undischarged insolvent, was not only not a necessary party, but was so clearly improperly joined (as having no interest) that the plaintiff had to pay his costs, his assignees having disclaimed. It is true that in *Barton* v. *Jayne* (3) (decided in 1834) the Vice-Chancellor refused to allow a demurrer to a bill by an undischarged insolvent, but upon the ground that the bill stated a case of collusion on the part of his assignees. He thought the bill must be answered.

In *Kaye* v. *Fosbrooke* (4), an insolvent debtor filed a bill against a person who was in possession of an estate which he claimed, alleging that his assignees had refused to sue for the estate, because they were apprehensive of incurring personal expenses, but that they were willing to concur in a sale of it for the benefit of the plaintiff and his creditors, and that, if the estate were sold, the proceeds would be sufficient to pay the creditors, and to leave a considerable surplus; and praying that the person in possession of the estate might be declared to be a trustee of the estate for the plaintiff and his creditors, and that it might be sold, and the proceeds paid to the assignees. Notwithstanding that the bill contained an averment that the assignees had refused to sue because they were apprehensive of incurring personal expenses,

(1) 16 L. R. Ir. 181.
(2) 1 Russ. & Myl. 638.
(3) 7 Sim. 24.
(4) 8 Sim. 28.

and that the estate would realize a considerable surplus after payment of creditors, a demurrer to the bill was allowed. The Vice-Chancellor says:—"The bill cannot, I think, be sustained, unless the plaintiff can make out that this is not a case in which the Insolvent Debtors' Court can interfere . . . This bill represents a case which one can scarcely understand. It charges that the estate is of the value of £5000 and upwards, and, if it were properly sold, there would be a considerable surplus after payment, in full, of all the plaintiff's creditors; that the plaintiff and his assigns had applied to Fosbrooke, to join in a sale of the estate, they being willing to confirm any mortgage made by Fosbrooke for securing part of the purchase-money. The bill then represents that, on the proceedings in the ejectment being commenced, the plaintiff applied to his assignees and requested them to institute a suit for the purpose of obtaining such relief as was sought by the bill; but that the assignees, being apprehensive of incurring personal expenses, had refused either themselves to institute, or to allow the plaintiff, in their names, to institute such suit; and then it asks that the hereditaments may be sold, &c., the plaintiff and his assignees being willing to confirm any mortgage that may have been made thereon by the defendant, in respect of any moneys that have been applied in payment of the purchase-money, and that the residue of such moneys may be paid to the assignees, for the benefit of the plaintiff and his creditors. It appears, therefore, that the assignees have refused to institute a suit, and yet the bill represents that they are willing to concur in a sale, and they are the persons to whom it asks that the money may be paid. This is very unlike collusion; and, in my opinion, there is nothing on the face of the bill, which can be fairly said to be collusion; and, as I understand the Act, there is no ground to suppose that any damage will accrue to the plaintiff, by the refusal of the assignees to interfere with the ejectment." The demurrer was accordingly allowed.

In *Heath* v. *Chadwick* (1) the suit was by creditors of an insolvent to set aside dealings with the insolvent's property, and the bill was successfully demurred to, on grounds throwing light on, though the facts did not resemble, those in the present case.

(1) 2 Ph. 649.

M. R. 1904. HARRISON *v.* ANCKETELL.

In 1849, in the House of Lords, by the decision of *Rochfort* v. *Battersby* (1), the question—if question there was—was finally set at rest, so far as insolvency was concerned. *Rochfort* v. *Battersby* (1) is a peculiar case in some aspects, but in some points of view is not unlike the present. The bill had been entertained before the Lord Chancellor for Ireland, and the fact of the defendant, William Henry Rochfort, being an insolvent debtor was undisclosed, and it was not till an appeal was taken by him, and till the appeal was in progress in the House of Lords, that the point was made. It appeared that in the year 1821 the appellant was discharged as an insolvent debtor in England; and on the 21st of July, 1821, he executed an assignment of all his real and personal estate to the provisional assignee who, by deed of 17th of February, 1823, assigned the same to the assignees of the estate and effects of the insolvent, who were made respondents in the appeal, but took no part in complaining of the decree. The appeal was called on and partly opened, and then Mr. Bethell objected that it was not competent to the appellant to be heard in the case. He said:—"This is an appeal by an insolvent, whose assignees do not appeal against the decrees, though they were parties to the suit in which those decrees were pronounced. In this suit, which was a suit by the mortgagee against the appellant, certain trustees of the mortgaged estates, and the jointress, she set up here claims under the jointure as a prior charge on the lands, and a report was made in her favour. To that report the assignees took exceptions, which were overruled, and the second decree was made. The assignees do not appeal against this second decree. The insolvent cannot do so." Then Lord Brougham says:—"Was he not a party to the suit below?" and the answer is, "He was." And then Lord Brougham says:—"And the decree was against him as well as against the assignees. Can it be doubted that he has an interest in the matter?" The reply is:—"He cannot properly be a party to the suit, nor consequently to the appeal. All his interest is now vested in his assignees, and they do not complain of the decree."

That was the point on which, in the course of the argument,

(1) 2 H. L. Cas. 388.

Lord Cottenham made an interlocutory observation. He says:— "In that case every insolvent and bankrupt would be a necessary party to a suit between a mortgagee and the assignee." That was a striking case because there a man was allowed to prosecute an appeal; and because he had become an insolvent long before the commencement of the proceeding, the appeal was dismissed. It struck the Lord Chancellor as an extraordinary thing, but he allowed the objection; and in a considered judgment he says (p. 403):— "In the discussion of this case, it appeared that an appeal had been brought by a party who had taken the benefit of the Insolvent Debtors Act . . . . Now it is a matter to be regretted that the question of competency was not raised in the early part of the proceeding, before the Committee of Appeals, which is the proper tribunal in the first instance to dispose of questions of that sort. If there it had been found that there was any difficulty or doubt about the point, the regular course would have been to refer it to the House; but the question ought to have gone before the Committee of Appeals in the first instance. Ordinarily speaking, where no question of difficulty occurs, the Appeal Committee disposes of any matter of that sort, and by so doing saves very great expense and delay to the parties who, otherwise, might be needlessly brought here in the regular course for hearing the appeal, when, upon discussion here, it might turn out that the appeal could not be entered into, in consequence of the defect of title of the party appealing. The proper course is to avoid needless expense, by discussing the question of competency before the Appeal Committee . . . Now, my Lords, it is much too late to discuss the question whether this appellant is a proper party to this cause—having already disposed of that portion of the ground on which it was contended that he ought to have been a party to the cause—I mean the personal contracts into which the insolvent entered subsequently to his insolvency, and confining my observations to his interest in the property which passed by the insolvency, beyond all doubt the insolvent was not a proper party to a contest, relative to the priority of charges upon that property passing to the assignees. My Lords, many cases have been quoted on this subject. In a late case, I had occasion, in the Court of Chancery, to consider those cases, and I can see no reason whatever, from any-

M. R. 1904. HARRISON v. ANCKETELL.

thing that has passed on this occasion, to alter the opinion that I then expressed. What I did express, after a consideration of all those cases, is to be found in *Heath* v. *Chadwick* (1), in which I state this as a result of the investigation of those cases:—'The Acts give ample power to the jurisdiction created by them, to meet all such cases as are stated in the bill, particularly by the removal of the assignee, if he improperly uses or omits to use the authority vested in him; and it is obvious that if individual creditors were permitted to file bills in this Court, instead of resorting to the jurisdiction specially created for enforcing their rights and interests, the public would be deprived of much of the benefit of such special jurisdiction, and much of the business which ought to be transacted there would be transferred to this Court. I have, therefore, much satisfaction at finding that, in several recent cases, this subject has, as it appears to me, been put upon a proper footing.'" He then refers at length to a number of cases and says:—"The case of *Collins* v. *Shirley* (2) brings the case, not more in principle, but more in point of fact, within the circumstances of the present case, and as it seems to me they are identically the same. There a bill of foreclosure had been filed against the insolvent and his assignees, upon which the assignees disclaimed, and offered to release. The assignees claimed no benefit in the mortgage; the title of the mortgagee had been prior to their own; and they therefore abstained from litigating the point; the discussion arose upon a question of costs. The assignees withdrew from the contest, and it remained only between the insolvent and the mortgagee. 'The Master of the Rolls held that the assignees were not entitled to their costs, but that Shirley (that is the insolvent) had been made a party improperly, and ought therefore to have his costs.' That was identically the same as here. The assignees represented the property and were therefore properly made defendants; but, as to the insolvent, the Master of the Rolls, Sir John Leach, said, that he was improperly made a defendant; the consequence was that the Court gave him his costs. Now, all these cases refer to the state of the matter as it stands on this appeal, and show that the insolvent under the Insolvent Debtors'

(1) 2 Ph. 651. (2) 1 Russ. & Myl. 638.

Act is not considered by the Court as having any such interest in the property as entitles him to enter into any litigation respecting it. It cannot be stronger than this. We find a bill filed by the insolvent, alleging, upon the face of it, that there is a surplus, which practically is made use of by him to show that he had an interest; but although the law would give him back again that surplus, if it should ultimately arise, the Court says, 'Although you have alleged that fact, a demurrer might be taken to that allegation on the ground that that fact does not, under the statute, give you such an interest as entitles you to sue upon it.' A demurrer is therefore held to be good to a bill filed by an insolvent, although he alleges a probable surplus, and although he alleges combination and conspiracy to rob him, as between the assignees and the creditors. There cannot be a stronger proof therefore that the Courts have always considered these Acts of Parliament as divesting the insolvent of all title and interest in the property which would authorise and justify him in entering into any litigation respecting it." He then goes on to deal with the other question as to the objection not having been taken in the Court below. Lord Brougham concurred, and thought the matter was one in which it was requisite something should be done by the Legislature to enable insolvents to obtain the use of the names of assignees on giving an indemnity. On the latter point, as to whether when Mr. Rochfort had been improperly made a party to the suit, it was competent to him to prosecute the appeal; it was decided that he had no *locus standi* for an appeal by him against the judgment of the Court below; but it will be observed that that question does not arise in the present case, and turns on the fact that the man had been brought into the suit improperly, and against his will.

Is there, then, any solid distinction between that case and the present? There can be none; unless a different rule prevails in insolvency cases from that in arrangements.

In *Rochfort* v. *Battersby* (1) the insolvency occurred in 1821, and the assignments were made in that year, and in 1823. The Act which applied was, therefore, the Insolvent Debtors Act of

(1) 2 H. L. Cas. 388.

M. R. 1904. HARRISON v. ANCKETELL.

1820, 1 Geo. 4, c. 119, sect. 4 of which provides that persons in custody for debt may apply by petition in a summary way for discharge. The petition is to state debts, &c., "and such prisoner shall, at the time of subscribing such petition, duly execute a conveyance and assignment, in such manner as the said Court shall direct, of all the estate, right, title, interest, and trust, to all the real and personal estate and effects of every such prisoner (except wearing apparel, &c.), so as to vest all such real and personal estate and effects in the provisional assignee of the said Court, subject to a proviso that in case such prisoner shall not obtain his discharge by virtue of this Act, such conveyance and assignment shall from and after the dismission of the petition of such prisoner praying for his discharge be null and void to all intents and purposes." By section 6 he is to prepare a schedule of debts and property, and section 7 provides for the assignment by the provisional assignee in whom the estate vested to assignees in trust for the creditors, and section 8 makes certain provisions recognizing the interest of the debtor in the surplus after payment of debts.

Obviously, if there be any distinction, the provisions of sects. 349, 267, and 268, of our Act of 1857, are more wide and more favourable to complete vesting than the deed to be executed under the English Act of 1820.

Rochfort v. *Battersby* (1) (as I have read from the judgments) shows that the surplus, if any, in the hands of the assignees will belong to the insolvent, on general principles of law. This is further shown by the judgment of Lord Cranworth in *Wearing* v. *Ellis* (2). In that case it was held that the devisee of an insolvent debtor who had taken the benefit of the Act, and who had obtained a release in full from all his creditors, was entitled to sustain a bill in equity in respect of surplus real property, which had been conveyed by the official assignee, without going through the mere matter of form of applying to the Insolvent Court for an order revesting the property in the assignee of the insolvent.

Lord Cranworth says (pp. 606, 607) :—"Now, coming, as I do, to the conclusion that this bill can be sustained, I certainly should

(1) 2 H. L. Cas. 388. (2) 6 D. M. & G. 596.

not have done so, had I not been perfectly satisfied that I do not in the slightest degree intrench upon the doctrine of any of the cases laying down this proposition, which ought to be the pole-star to guide us in questions of this sort—namely, that this Court has nothing whatever to do with the distribution of the property of a bankrupt or insolvent, the jurisdiction in which matters has, by the Legislature, been transferred to the Court of Bankruptcy, or the Insolvent Debtors' Court. In bankruptcy there is an appeal, while the decision of the Insolvent Court is absolute and supreme. But how does that doctrine apply to a case where the property, though it has been once vested in, has been conveyed by, the assignee, and after all the creditors have been satisfied? That they have been satisfied is not a matter of speculation; it appears from the insolvent's schedule that they have all been settled with and have released; it is stated, as a fact, and I take it to be clearly proved. The creditors, therefore, cannot be heard to raise any objection, neither can the assignee be heard to contest the point; he has conveyed the property for a valuable consideration, and has been satisfied. Then the question must be looked at just in the same way as if the assignee had actually in the first instance conveyed the property to Mr. Harrison, and Mr. Harrison had conveyed it to Mr. Cowburn by mistake, instead of to the plaintiff. It cannot, under these circumstances, be maintained that Mr. Harrison, or those deriving title under him, are debarred from claiming the property now, because there was a time during which the property was in the officer of the Insolvent Debtors' Court."

It is true that Lord Cranworth in that case criticises the decision of the House of Lords in *Rochfort* v. *Battersby* (1) (though, of course, he could not overrule it) in one respect, not material to the present case. He says:—"The decision of the House of Lords in *Rochfort* v. *Battersby* (1) was founded upon the same principle. I may observe, however, with reference to that case that, though I should be very unwilling to express a doubt about any decision of the House of Lords, especially in a case which has been so much considered, yet it seems a startling proposition,

(1) 2 H. L. Cas. 388

M. R. 1904. HARRISON v. ANCKETELL.

as stated in the marginal note, that a person being improperly made a defendant, and against whom a decree has been pronounced (other than that of dismissal of the bill with costs), could not be heard to appeal. That is a proposition which I think is too broadly stated. I have no doubt but that the object of that appeal was that the bankrupt might get relief, as it were, in bankruptcy or insolvency, and not on the ground that he was improperly made a party."

On that point the House of Lords might alter the view taken as regards the right to appeal in the case of a person in the position of the appellant in *Rochfort* v. *Battersby* (1), but that does not affect the decision in reference to this present question.

Thus the possibility, or probability, of there being a surplus available for the debtor personally, after payment of all his debts, does not, till the surplus has been actually established, by full conformity, and by payment of all creditors, confer on the debtor any right whatever to maintain an action in respect of the estate vested in the assignees.

It remains to consider whether in the present case anything has occurred to prevent the defendants from relying on this view of the law. 1. They have pleaded without raising the point, but the affidavits of Guedalla and Baker, denying knowledge before June, 1904, after defence filed, and on which they were not cross-examined, establish that they did not know of the defence the law gave them in reference to the litigation. It is said that they had imputed notice of all the facts through their solicitors; but this was not notice of equitable right affecting property, but of a fact of personal status which was not disclosed. It was not notice in the same proceedings; and though it is not always necessary that constructive notice should be in the same proceedings, in my opinion it falls short of any constructive notice which prevents the defendants from now raising the objection. The question remains whether, even if they are not prevented from raising the point by any express or imputed notice, it is now too late to take advantage of it. In the case of *Beattie* v. *Cordner* (2) the question was, whether, when there was a fund in Court a mortgagee creditor

(1) 2 H. L. Cas. 388. (2) [1903] 1 I. R. 10.

should be allowed to prove against the personal estate when the appointed time had gone by. This was opposed by Mr. Harrison, and I decided in his favour on the authority of a decision of Lord Chancellor Brady in *Gurney* v. *Oranmore* (1), by which I felt I was bound sitting in the same Court; but that decision has been overruled by the decision of the Court of Appeal in *Beattie* v. *Cordner* (2), and of the House of Lords in that case, reported as *Harrison* v. *Kirk* (3). In that case it is established that in an administration suit where there is a fund in Court there is a right of a creditor to alter his position and to prove against the estate, although the appointed time for doing so has gone by years ago. The case is not analogous to the present one, but it shows that rights may be insisted on, though they have not been put forward within the proper time. As regards the other proceedings in this Court and in the Land Judge's Court, which have been relied on as notice, the question in these proceedings simply was, as to who was to have the carriage of proceedings, and the effect of the decisions was as to the right to carriage merely. There is a wide difference between a decision as to that, and the right to sue affirmatively, in respect of property; and a declaration that a person is to have carriage of proceedings differs *toto cœlo* from a case in which a declaration of a right to sue is sought for.

Three courses were proposed by the notice of motion: (1.) To stay the proceedings; (2) for liberty to plead that all the estate and interest of the plaintiff in the matters in question herein became and are now vested in the official assignees in bankruptcy; (3) that the plaintiff should be ordered to give security for costs.

I take the third first.

There is no ground for this. If plaintiff has a right to sue in his name, there is no case for security for costs. If he has no right to sue, then that remedy would be inadequate. I, therefore, decline to make an order for security for costs.

Between the other two courses I have hesitated.

No doubt giving liberty to amend pleadings would under the old system have been the more regular course; but as said by Lord Blackburn in *The Metropolitan Bank* v. *Pooley* (4), the juris-

(1) 5 Ir. Ch. Rep. 447.
(2) [1903] 1 I. R. 10.
(3) [1904] A. C. 1.
(4) 10 A. C. 210.

M. R. 1904.

HARRISON v. ANCKETELL.

diction to stay proceedings for which there is clearly no foundation is an inherent jurisdiction from early times, if not the earliest. It plainly exists in frivolous and vexatious cases, but equally in those in which there is clearly no equity. The adoption of this course will have the consequence of avoiding—1, delay; 2, expense; 3, re-argument of the very same question, while the appeal is equally open.

As I entertain no doubt in the case, it is practically best, as was said in *Warder* v. *Saunders* (1), to stay the proceedings, as I accordingly do. The plaintiff to have liberty to apply within a reasonable time if he thinks advisable, and can obtain the consent of the assignees to become plaintiffs and sue, so that the benefit of the present proceedings may not be entirely lost.

Solicitors for the plaintiffs: *V. B. Dillon & Co.*

Solicitors for other parties: *Wallace & Co.*; *Gerald Horan*; *Galway & Boas.*

R. W. L

(1) 10 Q. B. D. 114.

KIERSEY *v.* FLAHAVAN.

(1904. No. 932.)

M. R.
1904.
Nov. 16.

Will—Condition in restraint of marriage—Contingent gift—Intermediate income.

A testator bequeathed a farm to his wife for life, and upon her death to his nephew W., provided he married M. F., but not otherwise, and appointed his wife residuary legatee. After the death of the widow M. F. refused to marry W. The personal representative of the widow claimed the farm under the residuary gift in the will:—

Held (1), that marriage with M. F. was a condition precedent to W. taking the farm; (2) that W., upon performing the condition, was entitled to the farm as from the death of the widow, and that it did not fall into the residue meanwhile, but that the rents and profits should be accumulated from her death until the condition was performed, or performance became impossible by the death of one of the parties.

ADJOURNED SUMMONS.

This was an application on behalf of William Kiersey, a legatee and one of the next-of-kin of James Kiersey, deceased, for the determination under Order LV., Rule 4, of certain questions arising on the terms of the will of the said James Kiersey, deceased, and in the administration of his estate.

The facts of the case were as follows:—

James Kiersey, of Ballymote, in the county of Waterford, farmer, died on October 30th, 1878, having made his will on the previous day in the following terms:—"I give and bequeath unto my sister-in-law, Eleanor Flahavan, the sum of £200 sterling, free of legacy duty. I give and bequeath unto the Rev. John Dooley, or other the parish priest of Dunhill at the time of my death, the sum of £20, free from legacy duty, to be applied by him for the benefit of the church at Dunhill. I give and bequeath unto my dear wife, Margaret Kiersey, the farm of land which I hold at Ballymote, same to be held and enjoyed by her during her life;

M. R. 1904.

KIERSEY v. FLAHAVAN.

and upon her death same is to go and belong to my nephew, William Kiersey, provided he marries Maria Flahavan, daughter of John Flahavan, and not otherwise; and all the rest, residue, and remainder of every kind of property of which I may die possessed I give and bequeath to my said wife, Margaret Flahavan, whom I appoint my residuary legatee. I nominate and appoint Edward Wilson, of Kiln, and Thomas Gough, of Killowen, executors of this my will."

The testator had no children. He left him surviving his wife, Margaret Kiersey, his nephew, William Kiersey, and his niece, Bridget Kiersey, now Bridget Hyde, wife of Thomas Hyde. Both executors died without having proved the will; Margaret Kiersey, the testator's widow, died on August 23rd, 1903, having made a will appointing Eleanor Flahavan, her sister and only next-of-kin, executrix; but no grant of probate had been taken out to Margaret Kiersey. On July 21st, 1904, Eleanor Flahavan obtained a grant of administration with the will annexed of James Kiersey, and was in possession of the farm of Ballymote referred to in his will. William Kiersey was a bachelor, and was ready and willing to marry Maria Flahavan, but she refused to marry him.

William Kiersey accordingly instituted these proceedings against Eleanor Flahavan to have the following questions determined :—

1. Did the plaintiff become entitled to the farm of Ballymote, in the will mentioned, on the death of Margaret Kiersey, notwithstanding that he has not fulfilled the condition attached to the bequest of the farm to him—namely, that he should marry Maria Flahavan, who refused, and still refuses, to marry the plaintiff?

2. If the said condition requiring the plaintiff to marry the said Maria Flahavan is valid, did the next-of-kin of the testator become entitled, on the death of Margaret Kiersey, to the said farm of Ballymote, liable to be divested if the said marriage should take place? or;

3. Is the representative of Margaret Kiersey, the residuary legatee of the testator, now entitled to the said farm, liable to be divested as aforesaid?

Samuels, *K.C.*, and *Brunskill*, for the plaintiff :—

It must be admitted that the condition here is a condition precedent: *Fitzgerald* v. *Ryan* (1); *Davis* v. *Angel* (2). But no gift over can take place until the condition is impossible of performance, and meantime the income must be accumulated. The farm is set apart from the rest of the estate, and the case comes within the rule that where leasehold or other personal property is given to trustees upon certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate, it carries the income, even though the gift be contingent: *Woodin* v. *Glass* (3), a case dealing with leaseholds: *Johnston* v. *O'Neill* (4), a case of a money fund: Theobald on Wills, 5th ed., p. 158.

If the intermediate income is not to be accumulated, it goes to the next-of-kin, not to the residuary legatee, as the testator intended to exclude this farm from the residue.

W. Martin Magrath, *K.C.*, and *Carrigan*, for the defendant :—

It is now admitted that the condition is a condition precedent, and that it can be performed at any time during the joint lives of the plaintiff and Maria Flahavan. The farm falls into the residue until the condition is performed, or becomes impossible of performance. There is no segregation of particular property here ; it is merely a contingent specific bequest, which will not carry the intermediate profits. It would be an extraordinary result if the farm was to be tied up during the joint lives of the parties. In *Johnston* v. *O'Neill* (4) and in *Woodin* v. *Glass* (3) the property (money and leaseholds) was directed to be set apart and held by trustees, upon trust for children on attaining twenty-one or marrying. The farm cannot be said to be undisposed of in the event of the plaintiff not marrying Maria Flahavan. There is no intention on the part of the testator to exclude it in that event from the residuary gift, which captures everything not disposed of : *Bernard* v. *Minshull* (5) ; *Harris* v. *Harris* (6) ; *Paton* v. *Ormerod* (7).

(1) [1899] 2 I. R. 637.
(2) 4 D. F. & J. 524.
(3) [1895] 2 Ch. 309.
(4) 3 L. R. Ir. 476.
(5) Johns. 276.
(6) I. R. 3 Eq. 610.
(7) [1893] 3 Ch. 348.

M. R. 1904.

KIERSEY v. FLAHAVAN.

Brunskill, in reply:—

The inconvenience of having the farm tied up can be avoided by an order for sale. This can be done by amending the summons and making it an administration summons, under which a sale can be directed.

THE MASTER OF THE ROLLS:—

James Kiersey, the testator in this case, died in the year 1878. By his will, which was made on the 29th October in that year, he gave a legacy of £200 to his sister-in-law, Eleanor Flahavan, and £20 to the parish priest of Dunhill to be applied for the benefit of the church at Dunhill, both free of legacy duty. He then gave to his wife a life estate in his farm, and, subject to the gift which is in question here, appointed her residuary legatee. He had no children. He appears to have been attached to his wife's family. Having given his farm to his wife for life, he directed that "upon her death same is to go and belong to my nephew, William Kiersey, provided he marries Maria Flahavan, daughter of John Flahavan, and not otherwise." It is more than probable that he did not contemplate the events which have happened. I should rather think that these young people must have been of marriageable age at the time he made his will, and, if so, they must be old enough now to know their own minds.

The plaintiff William Kiersey says that he is ready and willing to marry Maria Flahavan, but that she refuses to marry him. That is not conclusive, for he would have his whole lifetime and until she died to perform the condition; for even if one of them married some one else, that would not make the condition impossible, as he or she might afterwards become a widower or widow, and might then be in a position to fulfil the condition.

Therefore, as long as they both lived, the performance of the condition would be possible. The testator possibly thought that the marriage would take place, if at all, during his wife's lifetime, and as she lived till 1903, that might well have been so. It has not, however, occurred up to the present. The question now is, What interest does the plaintiff take? It has been properly

admitted by Mr. Samuels that this condition is a condition precedent, and that the performance of the condition must precede the vesting of the estate. If it was a condition subsequent, no such difficulty as has arisen would arise. But the words are—"to go and belong to my nephew, William Kiersey, provided he marries Maria Flahavan," which if they stood alone would make it a condition precedent; but he adds the words "and not otherwise," which make it perfectly clear that it is a condition precedent. An unfortunate state of things has thus arisen as to this little property. As the wife is dead, and the farm must be managed by some one, the question is, Who is to be entitled to it till the plaintiff performs the condition, or till the performance of it becomes impossible? The testator has not said in express terms what is to become of the farm in the meantime. If it is a condition precedent, as it is, then on the vesting of the property the plaintiff takes it in the terms of the will, that is, it is to belong to him. It is said that he would get the farm as from the date of the death of the tenant for life, and if so the income is not residue which would be undisposed of. Then he may die without performing the condition, and if so to whom does it go?

The general rule may be stated to be that when personal property is set apart and given to a person on fulfilling a condition, the income of the property follows the gift when the condition is fulfilled. Mr. Samuels cited *Woodin* v. *Glass* (1) in support of that proposition. But it is said that this is a different case, and a specific gift of a farm, and does not come within the rule laid down in that case. In *Woodin* v. *Glass* (1) the testator was dealing with leasehold property which he set apart on trust to pay the income to a daughter for life, and after her death upon trust to transfer the property to her children in equal shares, the shares of sons to be vested at twenty-one, and of daughters at twenty-one or marriage; and it was held that the intermediate income till one of the children attained a vested interest was applicable to the maintenance of the infant children. That case resembles this, only the condition there was attaining age or marrying, while here the condition is marrying a particular

(1) [1895] 2 Ch. 309.

M. R. 1904. KIERSEY v. FLAHAVAN.

person. Then Mr. Magrath says that there were trustees in that case, and that there are none here. That, in my opinion, makes no difference, as in that case other property was given to the same trustees, but upon different trusts. Then it is said that there was a segregation of particular property in that case, and none here. But here the gift is a segregation in itself, and the subject of it is not mixed up with the general residue until the gift fails to take effect. Nothing can, I think, be decided as to the ultimate disposition of the farm until the condition becomes impossible. Who is to take the income meantime?

Another question raised is, If the income does not follow the gift, does it fall into the residue, or is there an intestacy as to it, and does it go to the next-of-kin? The disposition of the Courts has always been to give full effect to a residuary gift, and so avoid intestacy. The absolute gift of the residue here no doubt conflicts with the intention of the testator, and contradicts his language. But a testator often thinks that he has not given the thing to his residuary legatee, and yet circumstances arise which make the legacy fail, and fall into the residue. It is said that because the widow took a life interest in the farm, she does not take it under the residuary clause. As regards the farm, could there be a question, if there had been a lapse by the death of the plaintiff in the lifetime of the testator, that the farm would not have gone to the widow absolutely, although it was, in the first instance, only given to her for life? There is no specific language to take the farm out of the residue; the only persons the testator intended to benefit were his wife and his nephew the plaintiff, with an indirect benefit to Maria Flahavan. The wife's estate becomes entitled to the farm on the happening of a particular event, namely the impossibility of the marriage.

Meantime the farm is a sort of no man's land, and cannot be said to belong to anyone. It ought to be managed for the benefit of the parties who may become ultimately entitled, or else it should be sold, and the proceeds invested. A receiver might be appointed or a sale directed, but neither can be done on the present summons, which is only a summons to determine the construction of the will. But if the parties wish, I can amend the summons, and make it one for administration and give a decree limited to the farm, and

dispensing with such of the usual inquiries as would be unnecessary, having regard to the time which has elapsed since the death of the testator, the debts having been paid or become statute-barred. The case can be mentioned again.

M. R. 1904. KIERSEY *v.* FLAHAVAN.

Solicitor for the plaintiff: *Thornton.*
Solicitor for the defendant: *Keane.*

W. L.

O'BRIEN *v.* CONDON.

(1904. No. 850.)

M. R. 1904. Nov. 7, 11.

Will—Secret trust—Gift to legatee "to be distributed as he thinks right"—Beneficial interest—Beneficiary under secret trust an attesting witness of will—Wills Act (1 *Vict. c.* 26), *s.* 15.

A testator bequeathed personalty to O., "to be distributed as he thinks right." He appointed no executor. O. was the person who prepared testator's will, and was verbally informed at the time of the execution thereof by testator that he wished him to do "as he thought fit with the money, to distribute it, after payment of debts, &c.," among five named persons, of whom B. (one of the next-of-kin) was one. O. accepted the trust:—

Held, that O. was, under the terms of the will, entitled for his own benefit; but that, as a secret trust had been accepted by him, he took on a trust enforceable by the Court for the beneficiaries named by the testator (1).

B. was a witness to the will:—

Held, that she was not thereby incapacitated from taking a benefit under the secret trust.

Re Fleetwood (15 Ch. D. 594) on this point not followed.

ORIGINATING SUMMONS.

John O'Brien, of Doneraile, in the county of Cork, shoemaker, made his will, dated 7th March, 1904, in the words following:—"I, John O'Brien, do hereby will and bequeath any money I shall die possessed of (including the money left to me by my brother James O'Brien) to the Rev. Walter O'Brien, C.C., Doneraile, to be distributed as he thinks right."

(1) Cf. *Balfe* v. *Halpenny* ([1904] 1 I. R. 586).—[REP.]

M. R. 1904.

O'BRIEN v. CONDON.

The testator appointed no executor. He died 23rd March, 1904. On the 22nd August, 1904, letters of administration, with the will annexed, of the personal estate were granted to the Rev. Walter O'Brien. In an affidavit made by him he stated as follows:—"I attended the deceased as a clergyman, and it was I who prepared the said document (the will) of the 7th March, 1904. The deceased informed me that he wished me to do entirely as I thought fit with his money, to distribute it after payment of debts, funeral expenses (including headstone, and providing for masses for himself and his brother), among the following persons:—Bridget Condon, Ellen Roche, Michael Dunne, David Dunne, and James Dunne. I asked him to say how much was to go to this person and how much to that, and he absolutely refused to say. I was to arrange all that myself."

The assets amounted to about £1000. Bridget Condon was one of four attesting witnesses to the will, and was also one of the next-of-kin of the deceased.

On 30th September, 1904, an originating summons was issued for determination of the questions arising on the construction of the will by the administrator, the Rev. Father O'Brien.

D. M'C. Mahony, for the plaintiff:—

1. On the face of the will itself there is no trust disclosed, and plaintiff is entitled to the property beneficially. In *Fenton* v. *Nevin* (1) the ground of the decision was that there the gift was to the legatee as executor, and that was the basis of the decision. Here the plaintiff is neither an executor nor trustee under the will. See also *Reid* v. *Atkinson* (2). The word "distribute" means no more than the more usual term, "dispose of." The same expression occurs in *Reid* v. *Atkinson* (2). See also *Sullivan* v. *Sullivan* (3).

2. Evidence is, however, admissible to show the existence of a secret trust which is binding, and the plaintiff submits to hold the property for the persons and purposes specified to him by the

(1) 31 L. R. Ir. 478. (2) I. R. 5 Eq. 162, 373. (3) [1903] 1 I. R. 193.

testator: *Scott* v. *Brownrigg* (1); *In re Fleetwood* (2). In *Hetley* v. *Hetley* (3), Joyce, J., held that parol evidence was not admissible, and doubted the correctness of *In re Fleetwood* (2). But in the later case of *In re Huxtable* (4), which went to the Court of Appeal, oral evidence was acted on to show what the particular purposes were.

3. Bridget Condon does not lose the benefit under the secret trust by the fact that she or her husband witnessed the will: section 15 of the Wills Act. Here Bridget Condon takes nothing "thereby," *i.e.* by the will. It is only by reason of the secret trust that she becomes entitled to anything. Even if the decision of Hall, V.-C., in *In re Fleetwood* (2), on this point be correct, it does not rule the present case. There the will and codicils themselves showed a trust for other people, and it was consequently only necessary to show by oral evidence who those other persons were. In one sense, therefore, Mary Head took under the will. That is not the case here. See also *Sullivan* v. *Sullivan* (5).

Fitzhenry, for the beneficiaries, other than Bridget Condon, claiming under a secret trust:—

Bridget Condon, by witnessing the will of the testator, has deprived herself of all benefit. Once a secret trust is established, then the effect is the same as if that trust is incorporated in the will: Wills Act (1 Vict. c. 26), s. 15. *In re Fleetwood* (2) governs this case. The beneficiary, who was held disentitled by reason of her witnessing the testamentary instrument in that case, was not mentioned in it at all.

A. M. Sullivan, for Bridget Condon:—

(He also, by order of the Court, represented the next-of-kin of the testator.)

There is a trust disclosed on the face of this will, and the case differs from those referred to. The will itself shows that the gift to Father O'Brien is not one for his own benefit. There is no

(1) 9 L. R. Ir. 246.
(2) 15 Ch. D. 594.
(3) [1902] 2 Ch. 866.
(4) [1902] 2 Ch. 793.
(5) [1903] 1 I. R. 193.

M. R. 1904. O'Brien v. Condon.

alternative given to the reverend gentleman. The property is to be "distributed" by him as he thinks right. He only receives it for the purpose of distribution. Though the testator does not name him as executor, still he gives the property to him in the capacity of executor, as in *Fenton* v. *Nevin* (1). The testator uses an unambiguous word. "Distribute" means scattering among several. It is not like "dispose of," which has acquired a secondary meaning, and "keep": see Judgment Mortgage Act, "disposing power . . . for his own use or benefit." The term negatives any right of retention, and implies gratuitous disbursement by a ministerial hand. It means "to bestow in portions or shares among a number of recipients": see New English Dictionary. The word has been judicially considered in *Fenton* v. *Nevin* (1). In his judgment in that case Fitz Gibbon, L.J., contrasts "distribute" and "keep." The trust, therefore, being indefinite, the next-of-kin take.

In the alternative (assuming there was a valid secret trust legally enforceable) we contend that Bridget Condon does not forfeit any benefit thereunder by reason of her being one of the witnesses of the will. She takes under the secret trust, and not under the will. Sect. 15 of the Wills Act provides that no attesting witness to a will to whom a legacy "shall be thereby given" shall be entitled to receive it. But in this case Bridget Condon does not take "thereby"; she takes in spite of the will. The principle of *Attorney-General for Ireland* v. *Cullen* (2) is that a legatee who takes under a secret trust cannot be said to take under a will which discloses no trust in his favour. *In re Fleetwood* (3) is not consistent with that case. [Counsel also referred to the following cases in reference to the question of secret trust: *Riordan* v. *Banon* (4); *Johnson* v. *Ball* (5); *M'Cormick* v. *Grogan* (6).]

Nov. 11.

The Master of the Rolls (after stating the facts):—

The facts, therefore, are simple, but they give rise to two points of some nicety. First, what estate and interest did the Rev. Father O'Brien take under the will of 7th March, 1904, which is

(1) 31 L. R. Ir. 478.
(2) L. R. 1 H. L. 190.
(3) 15 Ch. D. 594.
(4) I. R. 10 Eq. 469.
(5) 5 De G. & Sm. 85.
(6) L. R. 4 H. L. 82.

in these terms:—"I do hereby will and bequeath any money I shall die possessed of to the Rev. Walter O'Brien, C.C., Doneraile, to be distributed as he thinks right."

There is no executor named in the will. If the Rev. Walter O'Brien had been an executor, there could be no question but that a gift to him to distribute would deprive him of any beneficial interest in the property, because a devise to him in these terms would be primarily given to him in his capacity as executor; and if there were no trusts named in the will, the gift would enure for the benefit of the next-of-kin under the Statute of Distributions. But as the will does not designate any executor, the point to consider in the first instance is this, "Did Father O'Brien take on the face of the will a beneficial interest, or does he take merely as trustee by virtue of the word 'distribute'?"

It is very difficult to construe the language of such wills by merely parsing it. Testators use different language, sometimes one word, and sometimes another, and there is no decision that there is any necessary meaning of the word "distribute" standing alone; but there is nothing in the word itself to imply an absence of beneficial interest in property. *Fenton* v. *Nevin* (1) is distinguishable on the ground mentioned, and which formed the basis of the judgment of Fitz Gibbon, L.J., in the Court of Appeal, viz. that there was an indication that the property was to be taken by the legatees in the character of executors (2). But in this case the word "distribute" does not, in my opinion, show that it was intended that Father O'Brien should be merely a conduit-pipe or donee of a power to appoint among beneficiaries. "Distribute" does not imply an absence of beneficial interest in the property, nor can I see any solid distinction in law or fact between "distribute" and "dispose of." If the expression were "dispose of," it would be the very essence of the gift that the donee should be able to dispose of it as he wishes, and there is nothing etymologically in the word "distribute" making it different from "dispose of." Then is there any trust on the face of the will so that Father O'Brien must give away the property devised to him without retaining any

(1) 31 L. R. Ir. 478. (2) *Ibid.* 485.

M. R. 1904. O'Brien v. Condon.

beneficial interest in it himself? I think it is unarguable that there is any trust appearing on the face of the will; and if the transaction began and ended there, Father O'Brien would have got the property with an unconditional right to distribute it as he thought fit, in payment of his own debts, or by using it in any way he thought fit. But in order to get at the testator's meaning in this case, we must consider something outside the will. If there were no question of a secret trust, I have no doubt that the gift to the man of the property, to distribute as he thought right, made him complete *dominus* of it.

The case on that point is free from authority; but inasmuch as Father O'Brien does not claim that in fact there is an absolute gift to him of any beneficial interest in the property, the next question is whether, as it is given on a trust not disclosed by the will, it is a trust enforceable against him and binding on his conscience. This is a typical illustration of a secret trust. That phrase does not necessarily mean a trust of a clandestine nature, or one that is suppressed from the world. It only means a trust which is not disclosed on the face of the will itself. It is unnecessary to go through the authorities on the subject. It cannot be contended that if Father O'Brien were to put this money in his pocket, and refuse to give any of it to Bridget Condon or Ellen Roche, or any of the other persons named by the testator, he would not be guilty of personal fraud. He led the testator to infer that he would carry out his wishes; and if he were now to set them aside and close on the money, he would be guilty of gross personal fraud. That being so, it is a case of secret trust which, notwithstanding the Wills Act or the Statute of Frauds, will now be enforced, as binding on the conscience and honour of the legatee. A series of cases such as *Moss* v. *Cooper* (1) and *Johnson* v. *Ball* (2), and especially *In re Fleetwood* (3), show that the law is fixed, and that it does not make any matter whether the trust is disclosed before the making of the will or at the time it was made, or even afterwards, if the legatee, knowing the testator's wishes, has given him to understand that he will carry out his intentions. The statement of the testator in the present case appears to have been

(1) 1 J. & H. 352, 366. (2) 5 De G. & Sm. 85. (3) 15 Ch. D. 594.

a contemporaneous transaction with the will, and constitutes a secret trust within the meaning of the doctrine of the Court, and the legatee takes subject to this trust which is fastened on his conscience and will be enforced.

Another question has arisen for decision which has not evoked much sympathy from anyone. Bridget Condon is one of the next-of-kin of the testator, and is also one of the persons whom he declared his intention of benefiting, and who were the subject of the secret trust. She was one of the witnesses to the will, and it is said that she consequently loses all benefit under it *quâcunque viâ*, whether she takes by virtue of the will alone, as one of the next-of-kin, or by virtue of the will giving the property on trust for certain named persons of whom she is one; but the argument chiefly turned on the ground that she took a benefit under a declaration of secret trust. The 15th section of the Wills Act (1 Vict. c. 26) provides:—"And be it further enacted, that if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate," omitting the words in brackets, "shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will."

The question therefore is, whether Bridget Condon is a person to whom a "legacy, estate, interest, gift, or appointment" is "thereby" given or made, that is, by the will. She is not named in the will, and therefore she is not on the face of the will, at any rate, a legatee, and so far as her position is concerned under the will she would take nothing were it not for the secret trust.

Granting that on the face of the will she takes nothing and is not a legatee under it, it is said that by virtue of the will she takes

M. R. 1904.

O'Brien v. Condon.

an interest under the trust, because except for the will she could take nothing. If it were not for authority on the subject, I should have no difficulty in holding that the case is not within the mischief contemplated by the 15th section, and which it was intended to prevent; that is, to prevent a person taking any benefit under it because a person taking a benefit under the instrument ought not to be a witness to it. The witnesses ought to be independent. Here the person putting her signature to a document by which on the face of it she takes nothing, of whose contents she knew nothing, and as to the existence of any right under which she knew nothing, but which rather negatives the gift of any benefit to her, because there is an absolute gift to Father O'Brien, seems outside the mischief provided against by the statute; and if it were not for *In re Fleetwood* (1), I should have no hesitation in deciding that Mrs. Condon did not take anything under the will of John O'Brien. What she takes under the trust is something not under the will, but solely by virtue of the secret trust, not disclosed on the will; and if authority for that proposition be wanting, it is supplied by *Attorney-General for Ireland* v. *Cullen* (2), in which case property subject to a secret trust for charity was devised by will to two individuals; and it was held that the interest under the trust was not a legacy for charitable purposes under the will so as to be exempted from duty. The gift to the charity was held not to be a legacy, but something coming from a source different from the will.

No doubt, Hall, V.-C., did decide this very point in *In re Fleetwood* (1). He says, at the end of a long judgment on an entirely different subject, "Miss Mary Head, one of the attesting witnesses to the fourth codicil, being intended to be a beneficiary under the parol trust declared of the furniture, I think that the trust for her and her sister fails as to her beneficial interest, as it would have done had the trust been declared in the codicil, and that she and her sister being joint tenants of the beneficial interests of the furniture, the whole belongs to the sister."

No doubt that is a decision in point. It is open to the obser-

(1) 15 Ch. D. 594. (2) 14 Ir. C. L. R. 137; affirmed—L. R. 1 H. L. 190.

vation that the matter does not appear to have been argued; and I think the decision, so far as this point is concerned, is contrary to principle, and strains the language of the 15th section of the Wills Act. This benefit provided for Mrs. Condon is not, in my opinion, a legacy given by will; nor is it an interest or benefit given by will, but rather something claimed and obtained against the will. Under those circumstances what ought I to do? English Judges do not consider Irish decisions binding on them, though they always treat them with respect. Where there is no conflict with Irish cases, we are in the habit of treating English decisions as governing us here, though technically, perhaps, we may not be bound by them. If there is a conflict in principle between an English and an Irish case, we in Courts of first instance are bound to follow the Irish decision (1).

Having a strong and clear opinion, should I give effect to it, or should I follow a decision with which I do not agree, leaving it to the parties if they wish to go to the Court of Appeal?

On the whole, as the case was not argued before Hall, V.-C., and as this is a small estate, and I think it would be a hardship to put the parties to the perhaps unnecessary cost of an appeal, I think it better to give effect to my own opinion, which is in accordance with the governing principle in *Attorney-General* v. *Cullen* (2), and I decide that Bridget Condon does not lose her interest under the trust by reason of her being a witness to the will. I do not rest my judgment upon the fact (which seems to be immaterial) that she was a third witness—a complete attestation having preceded her signature, which was thus quite useless.

Solicitors for the plaintiffs: *O'Connor & Dudley.*
Solicitor for Bridget Condon: *Timothy Golden.*
Solicitor for other parties: *Timothy Golden.*

R. W. L.

(1) Cf. *Andrews* v. *Andrews*, 19 L. R. Ir. 572.—[REP.]
(2) 14 Ir. C. L. R. 137; affirmed—L. R. 1 H. L. C. 190.

M. R.
1904.

Feb. 5, 6, 18.
March 2.

Appeal.
June 8, 9, 30.

CHISM *v.* LIPSETT.

Settlement — Construction — Lost deed — Evidence of contents — Memorial — Estate pur autre vie *— Grant to trustees in trust for* A *and his heirs for life, and after his death to the use of the first and every other son of* A *and his intended wife, and in default of such issue to the issue female of the marriage — Power to appoint by will — Deed executed by donee of the power inconsistent with exercise of power — Release of power.*

By marriage settlement, dated the 1st May, 1806, made on the marriage of T. L. and A. D., lands held under a lease for lives renewable for ever were conveyed by J. L. (the father of T. L.) to trustees and their heirs, on trust to permit T. L., his heirs and assigns, to occupy and enjoy the lands during his life, and after his death to the use of the first, second, and all and every other the sons of the said T. L. lawfully begotten, and in default of such issue, then to the issue female of the marriage.

The settlement of the 1st May, 1806, was lost, and the only evidence of its contents was taken from a memorial from the Registry of Deeds. The lease for lives renewable for ever was converted into a fee-farm grant in 1856.

By his will, dated the 4th June, 1858, T. L. devised one portion of the lands to his son W. L. and to the heirs of his body, and the remaining portion to him for life, with remainder in each case as he should by will appoint.

By his will, dated the 13th February, 1883, W. L. appointed all the lands to T. W. L. and H. C. L. in fee; and by indenture, dated the 11th November, 1884 (executed on the marriage of his niece, A. L.), W. L. granted the same lands to trustees, in trust, subject to limitations which determined, for A. L. in fee. A. L. died in 1886; W. L. died in 1902:—

Held, by the Master of the Rolls—(1) on the construction of the settlement of the 1st May, 1806, that T. L. took an estate for life, with an ultimate limitation in fee, and that, the estates of the sons and daughters being life estates only, the title should be traced through T. L.; (2) that the power of appointment, though exercisable by will only, could be released; and that the deed of the 11th November, 1884, operated as a release of the power, and that the plaintiff was entitled to the lands as heiress of A. L. or of T. L.

Stuart v. *Kennedy* (3 Ir. Jur., O. S., 305) not followed.

Held, by the Lord Chancellor and Holmes, L.J., that under the settlement of the 1st May, 1806, the sons and daughters took life estates only, and that there was an ultimate remainder to T. L. in fee.

Held, by FitzGibbon and Walker, L.JJ., that the sons and daughters took

life estates, with a resulting trust to the settlor, J. L., and that on the death of J. L., in 1829, intestate, T. L., as his heir, became entitled.

Held, also, by the Court of Appeal, that the deed of the 11th November, 1884, being inconsistent with the exercise of the power of appointing by will, operated as a release of the power, and that the plaintiff was entitled to the lands.

ACTION by Elizabeth Dorcas Chism against Thomas William Lipsett for a declaration that the plaintiff was entitled to a portion of the lands of Cashel in the county of Donegal.

By indenture of settlement, dated the 1st May, 1806, made between James Dundas and Anne Dundas (his daughter) of the first part; John Lipsett and Thomas Lipsett of the second part; and Robert Dundas and Francis Lipsett of the third part; being the settlement made on the marriage of Thomas Lipsett and Anne Dundas, John Lipsett granted to Robert Dundas and Francis Lipsett and to their heirs, part of the lands of Cashel, in the county of Donegal, then held under a lease for lives renewable for ever "in trust to permit and suffer the said Thomas Lipsett, his heirs and assigns, to hold and occupy the said lands, and the rents and profits thereof, during his life, and after his decease then to the use of the first, second, and third, and all and every the son and sons of the said Thomas Lipsett, lawfully to be begotten on the body of the said Anne Dundas, and in default of such issue, to the issue female of the said intended marriage."

The settlement was lost, and the only evidence of its contents was a copy of the memorial from the Registry of Deeds.

Thomas Lipsett entered into possession of the property comprised in the settlement, and remained in possession until his death on the 5th June, 1859. In 1829 John Lipsett, the settlor, died, leaving Thomas Lipsett his heir-at-law.

Thomas Lipsett had six sons and four daughters, namely:—

1. John Lipsett, who died on the 20th April, 1845, in the lifetime of his father, leaving three children.
   (*a*) John Lipsett, junior, who died on the 27th August, 1867, intestate and unmarried.
   (*b*) Elizabeth Dorcas Lipsett, the wife of John B. Chism, the plaintiff in this action.

M. R. 1904.

CHISM v. LIPSETT.

(*c*) Annie Lipsett, who married Sir Thomas F. Brady, and died on the 14th June, 1886, in childbirth, leaving one child only, an infant son, who survived her only a few hours.

2. James Lipsett, died on the 22nd March, 1876, unmarried.
3. Thomas Lipsett, died on the 17th May, 1842, in the lifetime of his father, unmarried.
4. William Lipsett, died on the 5th June, 1892, unmarried.
5. Robert Lipsett, died on the 15th June, 1849, unmarried.
6. Henry Caldwell Lipsett, died in May, 1869, leaving a widow, Emma Lipsett, and three children, him surviving, namely:—
   (*a*) Thomas William Lipsett—the defendant in this action.
   (*b*) Henry Caldwell Lipsett.
   (*c*) Marianne Lipsett.

The four daughters of Thomas Lipsett the elder all survived him, and died without having been married, viz. Sarah Lipsett died on the 5th May, 1882; Frances Lipsett on the 22nd January, 1895; Mildred Lipsett on the 29th April, 1901; and Louisa Lipsett on the 15th December, 1902.

Thus, the only surviving issue of the marriage of Thomas Lipsett the elder, living at the date of the action, were the plaintiff, the daughter of John Lipsett, the eldest son, and the three children of Henry Caldwell Lipsett, the youngest son, viz. the defendant, Thomas William Lipsett, and the defendant's brother and sister, Henry Caldwell Lipsett and Marianne Lipsett.

The plaintiff claimed that in the events which had happened she was entitled to the lands as tenant in tail under the settlement of the 1st May, 1806.

In the alternative the plaintiff claimed that on the death of Thomas Lipsett the elder, in 1859, his second son, James Lipsett, and his fourth son, William Lipsett, entered into possession of all the property comprised in the said settlement of the 1st May, 1806, and held exclusive possession thereof as joint tenants, and acquired a title thereto under the Statute of Limitations, and the plaintiff submitted that on the death of William Lipsett, the survivor,

she, as his heiress-at-law, and also under a settlement dated the 11th November, 1884 (more fully stated hereafter, *infra*), became entitled to the same.

In the alternative the plaintiff claimed that prior to the death of Thomas Lipsett the elder, in 1859, the said James Lipsett and William Lipsett were in exclusive possession of the lands in two moieties, and continued in such possession until their deaths, James Lipsett, until his death on 22nd March, 1876, and William Lipsett, until his death on 5th June, 1892, and each acquired a title to the moiety occupied by him under the Statute of Limitations.

As to the moiety of the lands comprised in the indenture of settlement of 1st May, 1806, so occupied exclusively by William Lipsett since 1859, and also as to all right and title he had acquired in the whole of the lands comprised in the settlement, the plaintiff claimed that by an indenture dated the 11th November, 1884, made between William Lipsett of the one part, and Thomas Francis Brady of the other part (being a settlement executed on the marriage of Thomas F. Brady and Annie Lipsett, niece of said William Lipsett), the said William Lipsett, as settlor, granted the said lands to the said Thomas F. Brady, in trust for William Lipsett for life, then for his three sisters then living for life, with an ultimate trust for the said Annie Lipsett, her heirs, executors, administrators, and assigns, absolutely. The said Annie Lipsett married the said Thomas F. Brady on the 14th November, 1884, and died in childbirth on the 14th June, 1886, leaving one child only, who survived her only a few hours. The plaintiff was the heiress-at-law of the said Annie Lipsett.

The lease for lives renewable for ever, under which the lands were originally held, was converted into a fee-farm grant on the 15th March, 1856.

By his statement of defence the defendant denied that the plaintiff was tenant in tail of the lands, and further alleged that if she ever was so entitled her claim was barred by the Statute of Limitations.

The defendant further submitted that, on the construction of the settlement of the 1st May, 1806, upon the death of all the sons and daughters of Thomas Lipsett, the tenant for life, there

M. R. 1904.

CHISM v. LIPSETT.

was a resulting trust in favour of John Lipsett, the settlor, and that on the death of John Lipsett, the settlor, in 1829, intestate, Thomas Lipsett, his heir-at-law, became entitled. Thomas Lipsett, by his will dated the 4th June, 1858, devised part of the lands comprised in the settlement to his son James Lipsett for life, with remainder to his son William Lipsett, and to his heirs lawfully to be begotten, and to such arrangement as the said William Lipsett by his last will might appoint, and the remaining part of the said lands he directed to be divided between the said William Lipsett and his son Henry Caldwell Lipsett, share and share alike during the term of their natural lives, and to such arrangement as they by their last will, or the survivor of them, might appoint.

Henry Caldwell Lipsett never exercised the power of appointment vested in him by the will of Thomas Lipsett, and William Lipsett (having survived Henry Caldwell Lipsett) by will dated the 13th February, 1883, appointed the entire interest in the lands comprised in the settlement (subject to life estates which have determined) to the defendant Thomas William Lipsett, and Henry Caldwell Lipsett, junior, a brother of the defendant. On the death of William Lipsett in 1892, the defendant claimed that he and his brother became entitled to the lands.

As an alternative defence the defendant pleaded that on the construction of the settlement of 1st May, 1806, Thomas Lipsett was entitled to an estate in tail male in the lands comprised in the settlement in remainder expectant on the decease of all his sons by Anne Dundas, and that the defendant was, in the events which had happened, entitled to the lands under the said limitations.

The defendant further pleaded that James Lipsett and William Lipsett were in possession either under the trusts of the settlement or under the will of Thomas Lipsett, and pleaded that they, or those claiming through them, were estopped from alleging that they ever had such possession as is required for the purpose of the Statute of Limitations.

Ronan, K.C., Henry, K.C., and *M'Loone*, for the plaintiff.

Wylie, K.C., and *R. E. Osborne*, for the defendant.

THE MASTER OF THE ROLLS (after stating the facts) :—

The loss of the original settlement of 1st May, 1806, has greatly embarrassed the case, and rendered it difficult to acquire any real certainty as to the rights of the parties. The memorial of its registration is the only evidence forthcoming as to its contents; but it is good *prima facie* evidence (to say the least) against any one claiming under Thomas Lipsett, or under the settlement; and standing alone, I cannot deal with it as otherwise than a correct representation of the deed itself.

I offered to give an opportunity of making further search for the original, but all parties agreed that nothing more could be done with the least hope of result; and so I have to take the memorial as I find it.

This memorial, therefore, shows that the deed was an antenuptial settlement on the marriage of Thomas Lipsett and Anne Dundas; that John Lipsett, father of Thomas, was lessee for lives; that Anne Dundas had a fortune of £400; and that the lands in lease were conveyed to trustees and their heirs to hold to them, their heirs and assigns, reserving a rentcharge of £20 per annum to John for his life, and upon trust to permit and suffer Thomas, his heirs and assigns, to hold the lands for life, "and after his decease then to the use and behoof of the first, second, and third, and all and every other son and sons of the body of the said Thomas Lipsett, lawfully to be begotten on the body of said Anne Dundas; and in default of such issue to the issue female of said intended marriage." Then follows a provision for a jointure annuity of £40 for the wife, with powers of entry and distress.

The first question is, What interest passed by the deed of the 1st May, 1806? Having regard to the nature of the transaction—a marriage contract and settlement—there can be no question but that the entire estate *pur autre vie* was intended to pass. It is limited three times to "heirs," and whether or not the trustees took any estate, or whether they were merely "conduit pipes," the uses being executed under the statute, the intention to pass the entire interest once and for all away from John Lipsett (subject, of course, to his annuity) is abundantly clear. No other form of conveyancing language could make this more clear.

But here the difficulty begins. What becomes of the lands

M. R. 1904. CHISM v. LIPSETT.

after the life estate of Thomas? If we were dealing with a devise, or with articles, there would be no doubt but that the lands would be held to be limited to the first and other sons of Thomas, successively in tail special, with remainder to the daughters in tail, leaving the other limitations necessary to exhaust the estate to be implied or omitted. No doubt the word "successively" does not occur, but it would in such an instrument be involved from the way the clause is drafted, and from the creation of estates tail.

This is, however, not a will, nor a marriage article, but a deed; and there are no words of limitation. What estate did the first and other sons take? A possible construction would be that they took as joint tenants for life. At common law this could not be the case, where the estates of the different takers do not take effect at the same time. But this is not an objection when the assurance operates under the Statute of Uses. I think, however, that, while it may not be possible to give effect to the intention as if this had been a will, the intention may be the same, and cannot be altogether disregarded. It seems to me that successive estates of some sort are intended by the words used; that is, that the words do not create but negative a joint tenancy; of course this is not like *Buckler's Case* (1), where there was an express joint tenancy, followed by a proviso that the takers should not occupy together, but in succession, and where the proviso, if valid, would operate as a covenant, but could not alter the estate expressed to be conferred.

If, then, the sons take successively, their estates must be either for life or *quasi* in tail. The objections raised to the first construction is that it will not exhaust the estate *pur autre vie* by limitations in favour of the issue, nor fulfil the ordinary purpose of a marriage settlement. The objection to the latter is that there are no words of limitation used in creating the sons' estates. Had I felt at liberty in a deed to give effect to a presumed intention without apt words, I should have then had to decide whether the estate to be implied in the sons was an estate in tail male or in tail general; whether, in fact, I should follow Lord St. Leonards (Handy-book,

(1) 1 Co. Rep., Part II., 55 a.

p. 141) or Mr. Vaizey. But I do not conceive that I have any such power. In *Brenan* v. *Boyne* (1), *M'Clintock* v. *Irvine* (2), and all the other cases with which I am acquainted on the subject, the question has been whether the entire interest passed or only a life estate. There has been no controversy whether, if more than a life estate is conferred, an estate *quasi* in tail should be presumed, and for obvious reasons. A grant of land by deed to a man without more gives him an estate for his own life. But an estate for a man's own life is a higher interest than one for the life of another. Blackstone says, "An estate for a man's own life is more beneficial and of a higher nature than for any other life." If, then, the intention be shown to pass the whole interest to trustees, by the use of apt words of limitation, it may well be that the *cestui que* trust will, without such words, take the whole estate to the exclusion of the general occupant.

But here, if successive estates were intended, the whole interest cannot have been intended for the first taker, otherwise the ulterior limitations would be meaningless and inoperative. The point, then, would be narrowed down to this—can I on this deed say that estates tail are created? for otherwise the estates must be for life.

It is here that the question of the effect of the secondary evidence of the settlement comes in. Standing as it does, the memorial has no words which could in a deed give an estate tail, even though we may conjecture that the settlor thought it did. In no case that I am aware of has the Court implied an estate tail in a conveyance of an estate *pur autre vie* without appropriate words, though the passing or not passing of the entire interest has been the subject of so many decisions depending on the principle I have referred to.

I think that by this instrument, while the whole interest *pur autre vie* passed, the estates of the sons and daughters were no more than life estates for want of words of procreation applicable to any but the first takers themselves. These words themselves, indeed, prevent any inference of an estate tail, for remoter issue could not be referred to by them.

(1) 16 Ir. Ch. R. 87. (3) 10 Ir. Ch. R. 485.

M. R. 1904. CHISM *v.* LIPSETT.

But then the question comes in, If the entire interest passed to the trustees, and if the estates of the children of the marriage are no more than estates for their own lives, which may not exhaust the estate, what becomes of the reversion (so to speak) expectant on the death of the survivor?

Here, I think, the very peculiar limitation to Thomas Lipsett is important—"To him and his heirs for his own life," &c.

At first sight this seems almost absurd; but, in truth, it is not so. Literally, it limits the estate to him in *quasi* fee, subject to his own life estate, and the life estates of his children—a mode of dealing with property which is not open to objection in a conveyance operating by force of the Statute of Uses. Thus he took a reversion in fee under the settlement, not by way of resulting trust, but as purchaser; and if nothing more had occurred, that estate would now be vested in the plaintiff as his heiress-at-law, the life estates being all exhausted.

But that is not what happened. Thomas Lipsett made his will, by which he devised part of the lands in the settlement to James for life, with remainder to William in tail, with remainder as he should by will appoint.

This will is set out in paragraph 6 of the statement of defence, where it is stated that the testator directed the remaining portion of the said lands to be divided between William Lipsett and his son Henry Caldwell Lipsett, share and share alike, during their lives, and to such arrangement as they by their will or the survivor of them might appoint. Thomas Lipsett died on June 5th, 1859, and his will was proved by James Lipsett and William Lipsett, the executors, on February 4th, 1864. It appears from paragraph 7 of the statement of defence that Henry Caldwell Lipsett never exercised the power of appointment vested in him by Thomas Lipsett's will; that William Lipsett survived Henry Caldwell Lipsett, and by his will, dated February 13th, 1883, appointed the entire interest in the lands comprised in the settlement, subject to life estates which have determined, to the defendant Thomas William Lipsett, and to his brother Henry Caldwell Lipsett, junior.

William Lipsett died on June 5th, 1892, without having revoked or altered his will, and without having been married,

and the defendant alleges that he and his brother, Henry Caldwell Lipsett, junior, became entitled to the lands comprised in the settlement, subject as aforesaid.

So far the defendant's case as to the lands in settlement would appear to me to be established, if there were nothing more in the case. There never was a case, I may say, more bristling with points and clogged with alternatives, as indeed the pleadings show.

The will of William Lipsett, as I have said, was made 13th February, 1883, and he did not die till 1892. In the interval Annie Lipsett, a niece of his, and sister of the plaintiff, was married to Mr. (afterwards Sir) Thomas Brady, and on that occasion a marriage settlement, dated 11th November, 1884, was executed, to which William Lipsett was a party, and by which he granted the lands to Thomas Brady as trustee for William Lipsett for life, remainder to his three sisters Fanny, Louisa, and Mildred, then living, for life, with remainder for Annie Lipsett, her heirs, executors, administrators, and assigns, absolutely. Annie Lipsett, then Brady, died on the 14th June, 1886, leaving a child who only survived her for a few hours.

In the view I take of the case, it is all-important to determine whether title is to be made through the mother or through the infant. If the latter, his heir would be Sir Thomas Brady. If the former, the plaintiff is her heiress. Now, if the estate had remained unconverted, the child, though his mother's heir, would not have taken by descent but as special occupant, and so, I think, would have been the last purchaser within the meaning of the statute relating to Inheritances and Descents. But the renewable interest had in 1856 been converted into an estate in fee-farm; and so the mother was the purchaser, and through her the plaintiff as her heiress-at-law would be entitled on the death of Louisa, the surviving tenant for life, on 15th December, 1902.

This assumes, however, that the settlement of 1884 stood alone; but it is confronted by the will of William Lipsett, which operates, if at all, by virtue of the power in that of Thomas; and so, it was argued, the dispositions under it must prevail. The power was a general one; and may be regarded for many purposes as equivalent to an estate. See the judg-

M. R. 1904.

CHISM v. LIPSETT.

ments in *Lambert's Estate* (1), and especially that of Fitz Gibbon, L.J., at pp. 267–8. I cannot doubt that the settlement of 1884, if it stood alone, was such an execution of the power as, though defective, would have been aided in equity; and no doubt William Lipsett looked upon it as putting an end to the provisions of his will. He never could have supposed that both could stand together, though he would have done better if he had in terms revoked the will.

The will speaks as from his death; the settlement as from its date. The latter contains a stringent covenant for further assurance by virtue of the Conveyancing Act, 1881 (44 & 45 Vict. c. 42, s. 7 (E)). The conveyance is executed by William Lipsett as settlor.

In my opinion it bound the settlor and his property in equity, so that the provisions of his will could not be allowed to prevail against it, as derogating from his grant, unless the circumstance that the will could only be made in exercise of a power makes a difference. It is unnecessary to consider whether it is an exercise of the power. Assuming that it is, it is in form a mere devise; and no doubt the testator supposed it revocable, and meant to revoke it *pro tanto* by the deed of 1884. That deed is for value, founded on the highest of considerations. To allow the will to operate against it would be to give effect to a plain and clear derogation; and that cannot be done.

If, then, the life interest, coupled with the general power to appoint to anyone was, in fact, an estate in the lands, that estate is bound in equity by the settlement and covenant. If it was not, then the effect of the deed for value with its covenant is to prevent William Lipsett from giving by will or otherwise any estate inconsistent with that conferred upon Annie Lipsett by the deed—in other words, to cancel the inconsistent appointment by will. That would, at the lowest, leave the lands undisposed of under the power in the will of Thomas Lipsett. But if they were not disposed of, they would, as I have shown, go to his heir, that is, to the plaintiff.

The defendant, however, contends that the power in the will of William Lipsett being exercisable only by will, could not be

(1) [1901] 1 I. R. 261.

released by the donee, and that nothing he could do could have that effect. That a power may be released by the donee is, as a general principle, unquestionable. The distinction as to powers to appoint by will was founded mainly on the case of *Stuart* v. *Kennedy* (1), where undoubtedly Lord Chancellor Brady decided the point, overruling the Master of the Rolls.

The Master of the Rolls there relied on *Greene* v. *Greene* (2), in which Sir E. Sugden stated—"There is no doubt upon the authorities that a man having a power may bind himself not to execute it, save subject to particular restrictions and conditions. He may release it altogether, or covenant to execute it in a particular manner, and the Court will give effect to such a covenant. Where the donee of a power restricts or limits himself in the execution of it, he must execute it accordingly, or not at all," and proceeded to say—"It has been attempted to distinguish this case from the present on the ground that the power there might have been executed by deed or will. It appears to me, however, that the donee of a power, though the power can only be executed by will, may by an instrument for valuable consideration bind himself not to execute the power, or not to execute it unless under certain restrictions." The Lord Chancellor, on the appeal, says:—"In that conclusion I cannot concur, for there appears to be a wide distinction between a power to be exercised by deed or will, and a power to be exercised by deed only *inter vivos*, and which is of a binding effect upon the party executing it; a power to be exercised by a testamentary disposition is capable of being afterwards revoked, and where the donor of this power limits the execution of it in the hands of the donee to a particular mode of execution of the latter description, the only solution that can be given to his intention in so doing is, that the donor intended the donee should possess the means of carrying her intention into effect with regard to the property, and of dealing with it in a manner that might be revocable afterwards, should anything subsequently vary her intention."

Stuart v. *Kennedy* (1), however, which was decided in 1850, reversing the decision of the Master of the Rolls in 1847, reported

(1) 3 Ir. Jur. (O. S.) 305. (2) 2 J. & LaT. 541.

M. R. 1904. CHISM v. LIPSETT.

in 11 Ir. Eq. R. 518, under the name of *In re Chambers* (1), has never been followed, so far as I am aware, and the opinion of the Courts seems against it.

Farwell on Powers, at p. 16, says :—"The rule applies to powers exercisable by will only, as well as to those exercisable by deed, or by deed or will." He refers to the cases decided before *Stuart* v. *Kennedy* (2), namely, *Barton* v. *Briscoe* (3), and *Horner* v. *Swaine* (4), and also to *Re Chambers* (1), but he does not mention *Stuart* v. *Kennedy* (2). *Palmer* v. *Locke* (5) is also referred to there. The exact point did not arise in *Palmer* v. *Locke* (5). In that case a father who had a limited power of appointment over a fund by will only among his children, made a will by which he appointed a sum of £500 to his son Joseph, and the remainder among his other sons. A few weeks afterwards he executed a bond binding himself that his son Joseph should receive, either out of his own property, or out of the fund subject to the power, the sum of £5000 at the least. The father died without revoking his will. The son Joseph mortgaged his interest, and it was afterwards sold, and the validity of the appointment was disputed by the purchaser. The main argument there was that the donee committed a fraud on the power. The Court of Appeal held, affirming the decision of Jessel, M.R., that the appointment was valid. The judgment was apparently on the ground that a power of appointment by will could be released equally with a power exercisable by deed or will. James, L.J., says, p. 299 :—"It had been decided in various cases that such a power as this could be released." On the whole, this seems to me to be the solution of what is a legal enigma.

But there are other lands not comprised in the settlement of 1806, and which were the undoubted property of the three old ladies, Fanny, Louisa, and Mildred Lipsett, the survivor of whom, Louisa, died in 1902, and which are claimed by the defendant, not as heir nor as devisee, but by contract. The plaintiff is the heiress of the survivor. Though the case of a gift of lands by

(1) 11 Ir. Eq. R. 518.
(2) 3 Ir. Jur. (O. S.) 305.
(3) Jac. 603.
(4) T. & R. 430.
(5) 15 Ch. D. 294.

parol is a difficult one to make and prove, it is not an impossible one, if the facts stated in the 11th paragraph of the statement of defence could be proved. But you must first show an actual contract, and then part performance of it. Has the defendant done this?

He was undoubtedly abroad in Buenos Ayres prior to 1893, and I may accept his statement that his old aunts asked him to come home. It is probable that they intended to leave him the houses by will. But the contract alleged is that in consideration of his coming home they were to give him up all this property, reserving nothing but a life interest in their own dwelling-house.

It is obvious that if this bargain was made, it must have been by letters when he was in Buenos Ayres; yet he says that though he had such letters and knew their importance, he left them behind him in South America, where they are. This is not credible. It is contradicted by all that happened when he did come home. The aunts were, as he says, persons of high honour; yet they complained in writing, and bitterly, of his depriving them of their property unjustly; and he himself sent a carefully prepared case to counsel, in which the statement occurs in the most emphatic way—"They (the aunts) desire him to manage the property for them, and that he and his brother Caldwell should succeed to it after their decease." He denied that he was ever appointed or asked to manage, and alleged that he was owner, and no one else.

The whole facts, and the letters produced, negative the idea that he ever was owner, or looked upon himself as such, during their lives, though he did take most unfair advantage of the position of the old ladies in reference to the property.

As I have said, it is no light matter to undertake to prove such a contract as the defendant relies on, and the non-production of the letters which alone could establish it, and the inconsistencies and worse to which I have referred, compel me to say that I cannot adopt his story as authentic. Indeed, even as he stated the contents of the letters he did not preserve, they were more consistent with what I believe is the truth—that is, a desire to have him at home to help them to manage, with the prospect of succeeding after their death—than with a bargain and sale. Probably they

M. R. 1904. CHISM *v.* LIPSETT.

intended him to have the place after their time, and the management of it meanwhile. But he did not treat them well, at least they thought so; and they made no will to carry out the intention.

W. L.

Appeal. June 8, 9, 30.

The defendant appealed (1).

Wylie, K.C., and *Osborne*, for the appellant:—

We submit that on the construction of the deed of 1st May, 1806, in so far as its contents can be ascertained from the memorial, there are three views which the Court may adopt, any of which would be in favour of the defendant:—1. There was a resulting trust in favour of John Lipsett, the settlor, the ultimate remainder in fee not having been disposed of; 2. There was a remainder to Thomas Lipsett, in fee, as it does not require words of limitation to pass the entire interest in an estate *pur autre vie*: *Brenan* v. *Boyne* (2); or 3. The memorial should be so construed that the property was put in strict settlement, estates for life to Thomas Lipsett, with remainder to the first and every other son in tail male, with remainder to the daughters as tenants in common in tail, with an ultimate remainder to Thomas Lipsett, in fee. Vaizey on Settlements, p. 1173.

William Lipsett had a power to appoint by will only, and the deed of 11th November, 1884, cannot operate as an exercise of the power. It is not such a defective execution of the power as equity will aid: *Reid* v. *Shergold* (3); *Walsh's Trusts* (4); *Lambert's Estate* (5).

The deed of 11th November, 1884, did not destroy the power of appointment: *Stuart* v. *Kennedy* (6); *Davis* v. *Tollemache* (7), so that the property passed by the will of William Lipsett. At

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER and HOLMES, L.JJ.
(2) 16 Ir. Ch. R. 87.
(3) 10 Ves. 369.
(4) 1 L. R. Ir. 320.
(5) [1901] 1 I. R. 261.
(6) 3 Ir. Jur. (O. S.) 305.
(7) 2 Jur. (N. S.) 1181.

the date of the deed of 11th November, 1884, William Lipsett was tenant in tail of the lands, which he purported to settle without barring the entail; and consequently the interest which he purported to convey came to an end with his death, so that if William Lipsett had never made a will the entire interest in the lands would not have passed by the deed of 1884.

Matheson, *K.C.*, *Henry*, *K.C.*, and *M'Loone*, for the plaintiff:—

The deed of 11th November, 1884, operated as an extinguishment of the power: any deed executed which is inconsistent with the exercise of the power destroys the power: *Green* v. *Green* (1); *Isaac* v. *Hughes* (2); *Heath* v. *Wickham* (3); *Radcliffe* v. *Bewes* (4). The decision of Sir M. Brady in *Stuart* v. *Kennedy* (5), reversing *Re Chambers* (6), is inconsistent with later decisions.

Under the settlement of 1806 the plaintiff is tenant in tail general, although she cannot recover by that title. Under the settlement of 1806 words of limitation were not necessary to pass the fee. Then it passed successive absolute interests or joint absolute interests. If it created successive absolute interests, then it came to John Lipsett, and the plaintiff is heiress-at-law; if it created joint absolute interests, then the property came to William Lipsett, and the plaintiff is entitled as his heiress-at-law.

The deed of 1st May, 1806, cannot be treated as an executory instrument, but must be construed as a deed. If you imply any estates in that deed in addition to what appears in the memorial, you must go through the entire course of limitations: *Fitz Gerald* v. *Fitz Gerald* (7). That would mean, in this case, estates to the first and other sons in tail male, with remainder to the sons in tail general, with remainder to the daughters as tenants in common in tail.

(1) 2 J. & L. 529, 541.
(2) L. R. 9 Eq. 191.
(3) 3 L. R. Ir. 376.
(4) [1892] 1 Ch. 227.
(5) 3 Ir. Jur. (O. S.) 305.
(6) 11 Ir. Eq. R. 518.
(7) [1902] 1 I. R. 477.

Appeal. 1904.

CHISM v. LIPSETT.

June 30.

LORD ASHBOURNE, C.:—

This is an appeal from the Master of the Rolls, and is not in reality as complicated as at first sight it seems to be. It, however, suggests several topics which need consideration, and it is necessary to avoid being led away by arguments which sometimes lead nowhere, and are calculated to obscure the real issues.

In substance the action is an equitable ejectment, and the plaintiff claims to be entitled to some lands of moderate value in the county Donegal, originally held under a lease for lives renewable for ever, converted into a fee-farm grant in 1854; whilst the defendants claim that, on the contrary, they possess a sounder title. In truth, there is no great real controversy as to the facts, the plaintiff claiming that, taking one point of view, she is entitled; whilst the defendants insist that their different point of view is sounder in law and more in consonance with the true construction of the documents in the case.

The root of the case is found in the marriage settlement of 1st May, 1806, of which only the memorial is forthcoming; and it has, of course, to be construed strictly as a deed—not as a will or marriage articles. This memorial is set out fully in the statement of claim, and the main questions that arise on it are, What interests do the sons of Thomas Lipsett, and what interest does Thomas Lipsett himself, take under its provisions? The defendants urge that the sons take in tail male, whilst the plaintiff claims, as one of her alternatives, that the words create an estate in tail general. But I regard neither of these suggestions as correct, and I see nothing to give the sons more than successive life estates, with the reversion in fee to Thomas Lipsett. The well-known cases of *Brenan* v. *Boyne* (1) and *M'Clintock* v. *Irvine* (2) do not at all affect this conclusion. The estate given to the trustees is never sufficient without words showing the intention to pass the equitable fee.

The names, ages, births, and deaths of the children of Thomas Lipsett are fully set out in the statement of claim and the judgment of the Master of the Rolls, and I shall only refer to such of them as are necessary to explain my meaning. Thomas Lipsett

(1) 16 Ir. Ch. R. 87. (2) 10 Ir. Ch. R. 480.

died in 1859, having had ten children. John, his eldest son, had three children—a son who died unmarried, Elizabeth, the plaintiff, and Annie, who, on 14th November, 1884, married Mr. (afterwards Sir) Thomas F. Brady, and died on 14th June, 1886, leaving a son, who survived her only a few hours. On the death of the last surviving sister of William Lipsett in 1902, all these questions were started.

As Thomas Lipsett took a reversion in fee, if there was nothing more, the plaintiff, as his heiress-at-law, would be entitled, if not barred by the Statute of Limitations.

But Thomas Lipsett had made his will in 1858, and that has to be followed. By that will he devised part of the lands to his son James, with remainder to his son William, with a power of appointment by will, and he directed the rest of the lands to be divided between his sons William and Caldwell for their lives, with a general power of appointment to them, or the survivor of them, by will. Thus on the death of James and Caldwell (who did not exercise the power), William Lipsett became the sole owner, with this general power of appointment by will.

William Lipsett by his will, dated 13th February, 1883, appointed the entire interest in the lands comprised in the settlement (subject to interests since determined) to the defendant Thomas William Lipsett, and to his brother Henry C. Lipsett, junior. William Lipsett died in 1892 without having revoked or altered his will, and without having been married, and the defendant alleges that he and his brother then became entitled to the lands subject as aforesaid.

If the case rested there, there would not be much complication. But the year after he made his will, that is, on 11th November, 1884, on the marriage of his niece, Annie Lipsett, he executed a marriage settlement, by which he granted the settled lands after his own life in trust for his three sisters, and after the death of the survivor, remainder to Annie Lipsett, otherwise Brady. If then this settlement of 11th November, 1884, stood alone, the plaintiff as heiress-at-law of Annie Lipsett, would be entitled to the lands on the 15th December, 1902, the date of the death of the tenant for life, Louisa Lipsett.

But the settlement of 1884 is confronted by the will of 1883,

Appeal. 1904.

CHISM *v.* LIPSETT.

Lord Ashbourne, C.

and the will of 1883 by the settlement of 1884. They cannot stand together. One must give way to the other; and the substantial question in the case is, Which is to prevail?

Mr. Wylie insists that the will of 1883, on the death of William Lipsett, operated as an appointment, and became effective in 1902 to vest the lands in the defendant. It is contended, on the other hand, that William Lipsett, by the deed of 11th November, 1884, released the power of appointment by will vested in him, and that therefore the governing document in the case is the deed of 1884, and not the will of 1883.

Under the Conveyancing Act of 1881 the deed of 1884 must be read as containing a stringent covenant for further assurance, which would be quite set at nought by the execution of the power found in the will.

There is no doubt that William Lipsett could have expressly and formally released the power. Is not a disposition or assignment of property by the donee of a power inconsistent with its execution practically the same as a release of the power? Would it not be unjust and inequitable, and therefore contrary to law, to use a power or rely upon its execution to destroy a deed duly executed by the donee of a power?

I entertain no doubt that the Master of the Rolls was right in holding that the deed must prevail against the will. I concur in his judgment, and, therefore, the appeal will be dismissed with costs.

WALKER, L.J.:—

The first question in this case is—What is the true construction of the settlement of the 1st May, 1806?

The only evidence of the settlement is the memorial, which being signed by the grantor is original evidence. We must construe it as a deed executed, and we cannot import anything into it, nor can we construe it in the way we could if it were marriage articles. It was said it should be read as an estate in tail male in the first son, but there is just as much reason for reading it as an estate in tail general in the first son, if we were at liberty to go beyond the terms of the deed.

The real difficulty is whether the sons get more than life

estates. The lands were held *pur autre vie*, and it was contended that as an estate in *quasi* fee may, upon an intention appearing, pass to a grantee without words of limitation, we should hold in this case that the first son took an estate in *quasi* fee. The only argument that can be adduced in support of that construction is that the lands were granted to trustees and their heirs in trust for the son or sons, and that the equitable estate should be as large as the legal estate in the trustees. In my opinion there is no authority for that contention. It is settled in the case of inheritable freehold estates that if there be a conveyance in fee to trustees, upon which there is an equitable use engrafted without words of limitation in favour of the equitable owner, only a life estate will pass. I think the rule is the same in the case of estates held *pur autre vie*. I agree that any words in the deed from which an intention can be gathered that the whole estate shall pass to the *cestui que* trust will be sufficient to create an equitable *quasi* fee, but this will not be satisfied by a grant in *quasi* fee to the trustees only.

In the cases of *M'Clintock* v. *Irvine* (1) and *Brenan* v. *Boyne* (2) there were estates in *quasi* fee vested in the trustees, but it was not contended that they would support a grant of the equitable fee. The decisions turned upon the express intention found by words in the grant expressing an intention that the equitable grantees should take the whole estate. In *M'Clintock* v. *Irvine* (1) this was found in the words "for his sole use and benefit, and for no other use, intent, and purpose," and in *Brenan* v. *Boyne* (2) the intention was collected from the words, "moiety of said estates and properties," *i.e.* moiety of the *quasi* fee vested in the trustees. It would not have been necessary to search for express declarations of intention, if the estate in *quasi* fee in the trustees was sufficient.

In *Lamphier* v. *Drapes* (3) the *quasi* fee was granted to the trustees, but no words of limitation were annexed to the estates which would be granted to the children, and there was no declaration of intention found, and, therefore, Sir Maziere Brady, L.C., held that the sons took only life estates. He says:—"If this,

(1) 10 Ir. Ch. R. 480. (2) 16 Ir. Ch. R. 87. (3) 14 Ir. Ch. R. 33.

Appeal. 1904. CHISM v. LIPSETT. Walker, L.J.

therefore, were a case of fee-simple estate, I should have no difficulty in saying that there was not enough to enable Thomas Lamphier to dispose of the fee. Then, is there as to this any distinction between a lease for lives renewable and a fee-simple? I cannot think that there is. I have gone as far as most persons, perhaps farther than most, when I can collect from the deed a sufficient declaration of intention to give absolute interests in freehold renewable leaseholds, but I cannot do this without having words to show an intention to give the lands for the entire interest of the grantee."

I think, therefore, that on this point the rule in *Doe* v. *Robinson* (1), recognized by Sir E. Sugden in *Crozier* v. *Crozier* (2), applies, and that only life estates passed, and that there was a resulting trust of the reversion which ultimately vested in Thomas Lipsett.

Thomas Lipsett had ten children, of whom John was the eldest. He died in 1845. William, the fourth son, was the last survivor, and he lived till 1902. Thomas Lipsett, the tenant for life, died on the 5th June, 1859. The eldest son John had three children, viz. John, who died without having been married in 1867, Elizabeth, Dorcas, the plaintiff, and Annie, who, on the 14th November, 1884, married Sir Thomas F. Brady, and died on the 14th June, 1886, in childbirth, leaving a son who survived her only a few hours. As the sons took only life estates, it is quite immaterial whether they took successive life estates, or life estates in common, or joint tenancy, because, on the death of the last surviving son William, in 1902, the will of Thomas Lipsett, made on the 4th June, 1858, came into operation. By it he devised part of the lands in the settlement to his son James for life, with remainder to his son William in tail, with a general power of appointment by will, and he directed the remaining part of the lands to be divided between his sons William and Caldwell as tenants in common for their lives, with a general power of appointment to them, or the survivor of them, by will. It has been assumed by the parties, and the facts all indicate, that James and Caldwell and William elected to take under the will of Thomas Lipsett. Caldwell did not exercise the power, and on the

(1) 8 B. & C. 296. (2) 3 Dr. & War. 382.

death of James and Caldwell, William became owner with a general power of appointment by will. He made a will on the 13th February, 1883, under which, if nothing more occurred, the defendant would, on William's death in 1902, be entitled as devisee.

The lands were converted into a fee-farm grant in 1856. On the 14th November, 1884, Sir Thomas Brady married Annie Lipsett, the niece of William, and daughter of the eldest son, and upon that marriage a settlement was executed, whereby William Lipsett conveyed the lands to a trustee, to hold in trust for William Lipsett for life, with remainder in the events that have happened to Annie Lipsett in fee. The plaintiff is the heiress-at-law of Thomas Lipsett, the settlor, and of John, his father, and also of Annie Lipsett, from whom, under the circumstances, if the settlement of 1884 was operative, the descent should be traced as purchaser.

Mr. Wylie, however, insisted that, notwithstanding the settlement of 1884, the will of William Lipsett of 13th February, 1883, became operative on his death in 1902 as an appointment of the lands to the defendant.

The plaintiff, on the other hand, contended that the settlement of the 11th November, 1884, operated as a release of the power of appointment by will vested in William Lipsett. In my opinion that contention of the plaintiff is well founded. I think it is settled law that any dealing with an estate by the donee of a power inconsistent with the exercise of that power released it. That was decided by Farwell, J., in *Foulkes* v. *Jackson* (1)—a stronger case than the present, inasmuch as the power vested in William Lipsett was a general power.

In any aspect of the case, therefore, the plaintiff, who is heiress-at-law of Annie Brady, became entitled in 1902 to the land, and the defendant, whose only title seems to be under the will of William Lipsett, which as an exercise of William's power has been released, cannot hold the lands against her. She is also heiress-at-law of Thomas Lipsett, and her father John; but any claim derived from those titles would be barred by the Statute of Limitations.

(1) [1900] 1 Ch. 807.

Appeal. 1904.

CHISM *v.* LIPSETT.

FITZ GIBBON, L. J. :—

I concur with Walker, L.J., whose judgment I have read.

HOLMES, L.J. :—

The question in this appeal is whether the plaintiff or the defendant is entitled to certain lands and premises in county Donegal, held by John Lipsett, under a lease for lives renewable for ever, and put in settlement by him in the year 1806, on the marriage of his son Thomas with Anne Dundas. The deed of settlement is lost, and the only evidence of its contents is to be found in the memorial executed for the purpose of registration pursuant to the Statute of Queen Anne. By this document it appears that the premises were granted by John Lipsett to trustees and their heirs to the use of Thomas Lipsett, his heirs and assigns, for life, subject to a life annuity in favour of John Lipsett, and after the decease of Thomas Lipsett to the use of the first, second, third, and all and every other son and sons of the marriage, and, in default of such issue, to the issue female thereof. It has been suggested that the statement of the gift to the children contained in the memorial is not complete, and that if the deed itself were forthcoming, there would be found in it something that would show more clearly the nature of the estates intended to be granted. If there has been such an omission, we have no means of supplying what is wanting; and we must ascertain the effect of the settlement upon the assumption that its limitations to the children of the marriage were in the words of the memorial. The construction given thereto by the Master of the Rolls is that the sons took successive life estates with remainder to the father in *quasi* fee. I am disposed to agree in this; and I do so the more readily, inasmuch as no other construction has been seriously presented by counsel on either side.

Thomas Lipsett, having obtained a fee-farm grant in lieu of the lease for lives renewable for ever under the provisions of the Renewable Leaseholds Conversion Act, died in the year 1859. He had six sons, all of whom are now dead, and of whom only the eldest and the youngest left issue. John, the eldest, had three children—a son who died unmarried and intestate, the plaintiff, and another daughter, Anne, who became the wife of Sir Thomas

Brady, and died in childbirth in 1886, leaving an infant son, who survived her only a few hours. The defendant is the eldest son of Caldwell Lipsett, the youngest of the sons of Thomas. There was probably some evidence before the Master of the Rolls as to how possession of the premises has gone since 1859; but if there was, it has not been referred to in this Court; and my information on the subject is derived from the admitted, or at least uncontradicted, statements of counsel on the one side or the other.

It appears therefrom that after the death of Thomas Lipsett, the limitations of the settlement of 1806 were not acted on, for no possible construction of those limitations would account for what has since occurred. Thomas Lipsett made a will, dated the 4th June, 1858, by which he purported to devise part of the premises settled in 1806 to his second son, James, for life, with remainder to his fourth son, William, in tail, and to such arrangement as William by his will might appoint. The remainder of the premises he directed to be divided between William and his sixth son, Caldwell, share and share alike for their lives, and to such arrangement as they, or the survivor of them, might by will appoint. This will was proved by James and William, who went on their father's death into possession of the settled property, and so continued until the death of James in 1876, from which time William remained in sole possession until he died in 1892. I understand that Caldwell was never in possession of any part of the premises, and in any case it is certain that since his death in 1869 no one claiming under him asserted title thereto until after the death of William.

The effect, therefore, of the long and unchallenged possession of James and William was to bar all rights of the other sons under the settlement of 1806; but I agree with Mr. Wylie that any estate or estates acquired by them through the Statute of Limitations would be held subject to the devises in the will of their father, under which they took possession. This will is the foundation of the title relied on by the defendant. Under it William, in the events that happened, had a general power of appointment by will over all the settled property; and it is said that he exercised this power by appointing, subject to certain life estates now determined, to the defendant and his brother. I

Appeal. 1904. CHISM *v.* LIPSETT. Holmes, L.J.

have seen no copy of this will made in 1883; but I understand that this is admitted to have been its effect, if at the time of his death he was not precluded from exercising the power by a deed of the 11th November, 1884. Other questions seem to have been discussed before the Master of the Rolls; but this was the only matter in controversy in this Court.

This deed was made in contemplation of the marriage of Annie Lipsett with Sir Thomas Brady; and by it William Lipsett purported to grant the premises settled in 1806 in trust for himself for his life, and subject to certain life estates and other limitations which have determined, with an ultimate limitation for Annie Lipsett, her heirs, and assigns. What was the effect of this instrument on the assumption that Thomas Lipsett was entitled to dispose of the premises by his will? Under the will, and in the events that happened, William was tenant for life of one portion and tenant in tail of the rest, with a general power of appointment over all. Mr. Wylie has argued that on the true construction of the settlement he did not purport to grant the fee and inheritance of the lands—that he merely conveyed his estate and interest therein. But the schedule to the instrument shows that the intention of the parties thereto was that a complete and absolute estate in the lands should be settled. If William's power of appointment could have been carried out by deed, no question would have arisen but it was to be exercised by will only; and I cannot go with the Master of the Rolls that this was such a defective execution of the power as would be aided in equity. It is, however, well settled that the donee of a power of appointment of this kind can give a valid covenant not to exercise it, and that a grant of the premises for valuable consideration is equivalent to such a covenant. I do not purpose to review the many authorities on this point. Most of them are to be found in the argument in *Heath* v. *Wickham* (1), and to those there quoted I may add the recent case of *Foulkes* v. *Jackson* (2).

William Lipsett's will, although executed before the settlement, only spoke from his death; and I am satisfied that the principle to which I have referred would be an effective bar to any appointee

(1) 3 L. R. Ir. 381. (2) [1900] 1 Ch. 807.

thereunder claiming as against the settlement. Thomas Lipsett, in addition to his six sons, had four daughters, all of whom died unmarried. Three of them survived their brother William, and seem to have gone into possession on his death. I understand that they were given life estates by both the will of 1883 and the deed of 1884, and this would account for their unchallenged possession. The present controversy arose upon the death of the surviving daughter in 1902, at which date the plaintiff was the heiress-at-law of Annie Lipsett, or Brady, to whom, in the events that happened, the settlement of 1884 gave the ultimate remainder in fee in the lands. She is also heiress of Thomas Lipsett, and of her father, John. I hold, therefore, that she is entitled to recover in this action.

Appeal. 1904. CHISM v. LIPSETT. Holmes, L.J.

Solicitor for the plaintiff: *R. Hall Reid.*
Solicitors for the defendant: *Hamilton & Boyton.*

R. D. M.

IN RE TURPIN AND AHERN'S CONTRACT.

M. R. 1904. July 11, 26. *Appeal.* Nov. 1, 2. Dec. 14.

Vendor and purchaser—Conditions of sale—Misleading condition—Condition not to inquire into prior title—Lease of recent date taken as root of title—Defect in prior title within knowledge of vendor.

By lease, dated the 18th March, 1865, C. demised to F. a farm in the county of Cork for twenty-one years. The lease contained a covenant against alienation without the consent in writing of the landlord, except a disposition of the whole to one person by will.

By his will, dated the 21st September, 1873, F. bequeathed his farm to his executors, one of whom was his wife, on trust for his daughter, subject to payment of £500 for his wife. F. died shortly after. In February, 1875, D. A. married Miss F., when two deeds were executed, both dated the 3rd February, 1875. By the first of these the executors of F. and Miss F. assigned the farm to D. A. in consideration of £500 paid to Mrs. F., and by the other deed D. A. assigned the farm to trustees upon trust for D. A. for life, with various other trusts. The settlement was lost, and the consent of the landlord in writing had not been obtained to either assignment.

By agreement, dated the 12th January, 1894, a judicial tenancy was declared of the farm from C. to D. A., and on the 30th July, 1901, C. granted

M. R. 1904.

In re Turpin and Ahern's Contract.

a new lease to D. A. for twenty-one years, from January, 1901. In February, 1904, D. A. put up the farm for sale by auction, and in the particulars it was described as held under lease for twenty-one years, from January, 1901. The eleventh condition of sale provided that the title was to commence with the lease of 31st July, 1901, and the purchaser was precluded from making any inquiry into or investigation of the vendor's title prior to the lease, and it was also stipulated that the purchaser should assume that the lessor had full power to grant same. T. was declared the purchaser, and on the search in the Registry of Deeds, the marriage settlement of the 3rd February, 1875, was discovered, and T. refused to complete the purchase:—

Held, by FitzGibbon and Walker, L.JJ. (*diss.* Holmes, L.J.), affirming the decision of the Master of the Rolls, that the eleventh condition of sale was misleading and unfair; that the title was defective; and that the purchaser should not be compelled to complete.

Held, by Holmes, L.J., that the assignment and settlement of the 3rd February, 1875, were both void, as being made in violation of the covenant against alienation; and that the trusts of such settlement did not attach to the tenancy of D. A. that came into existence after the expiration of the term of the lease of 1865.

Summons by John Turpin for a declaration that the vendor had failed to make a good title to the holding comprised in a contract for sale, dated the 18th February, 1904, in accordance with the particulars and conditions of sale, and for a return of the deposit.

By lease, dated the 18th March, 1865, Sir George Colthurst demised to Thomas Forrest the lands of Leemount in the county of Cork, containing 170 acres, for twenty-one years from the 25th March, 1864, at the rent of £340. The lease contained a covenant against assigning, subletting, or mortgaging the premises (save a disposition of the whole to one person by the will of the lessee) without the previous consent in writing of the lessor, his heirs, or assigns.

By his will, dated the 21st September, 1873, Thomas Forrest bequeathed the said holding to his executors, Honora Forrest (his wife), Michael Ahern, and Michael Forrest, upon trust for his daughter Norah Forrest, subject to the payment of £500 to his wife, Honora Forrest. Thomas Forrest died shortly afterwards, and probate of his will was granted on the 6th October, 1873, to his widow, and to Michael Ahern, and Michael Forrest.

Denis Ahern married Norah Forrest in February, 1875; and prior to the marriage two deeds were executed, both on the same day—the 3rd February, 1875. By the former of these deeds of the 3rd February, 1875, made between Honora Forrest, Michael Ahern, and Michael Forrest, executors of the will of Thomas Forrest of the first part, Norah Forrest of the second part, and Denis Ahern of the third part, in consideration of £500 paid by Denis Ahern to the executors, the said Honora Forrest, Michael Ahern, and Michael Forrest, as executors, and Norah Forrest as legatee, beneficially entitled, assigned the lands to Denis Ahern, his executors, administrators, and licensed assigns for the residue of the term of twenty-one years.

The other indenture of the 3rd February, 1875, was lost, but a statement of its contents was taken from the memorial from the Registry of Deeds. It was made between Denis Ahern of the first part, Honora Forrest and Norah Forrest of the second part, and Michael Ahern and Michael Forrest of the third part, and by it Denis Ahern assigned the aforesaid farm to Michael Ahern and Michael Forrest, and the survivor of them, his executors, administrators, and licensed assigns from thenceforth during the term so granted thereof as aforesaid, upon trust for Denis Ahern for life, and in the event of his death in the lifetime of the said Norah Forrest to pay to her the said Norah Forrest so long as the said presents should continue, but not further or otherwise, out of the rents and profits the annual sum of £50; and upon further trust in the event of the death of Norah Forrest in the lifetime of her intended husband without leaving any issue of the said marriage her surviving, or, in the event of there being issue of the said marriage living at the time of the death of Norah Forrest in the life of Denis Ahern who should die before attaining the age of five years, in either of such cases to pay to the said Honora Forrest, her executors, administrators, or assigns, out of the rents and profits of the lands, or by sale and mortgage thereof, the sum of £300. The memorial further stated—"And it was thereby further covenanted and agreed upon as therein."

The consent in writing by the landlord had not been obtained to either deed.

By agreement, dated the 12th January, 1894, between Sir

M. R. 1904.

In re Turpin and Ahern's Contract.

George Colthurst and Denis Ahern, Denis Ahern was declared a present tenant of the farm, and the fair rent was fixed at £210 10*s.*

On the 30th July, 1901, Ahern surrendered the holding to the landlord, and by lease, dated the 31st July, 1901, Sir George Colthurst demised the farm to Denis Ahern for twenty-one years from the 1st January, 1901, at the rent of £200 a year.

On the 18th February, 1904, Ahern advertised the farm for sale by auction.

The property was described in the particulars as the interest of the vendor "in the valuable farm of Leemount, containing 175A. 3R. 25P., or thereabouts, exclusive of roads and fences, held under lease for twenty-one years from January, 1901, at the yearly rent of £200; old rent, £295; Poor Law Valuation, £220 5*s.*"

The eleventh condition of sale was as follows:—

> "The vendor's title to the lands shall commence with the lease dated the 31st day of July, 1901, whereby Sir George St. John Colthurst, Bart., demised said lands to the vendor for the term of twenty-one years, from the 1st January, 1901, at the yearly rent of £200. The farm is therein described as containing 176A. 3R. 35P., but it is believed the farm now contains 175A. 3R. 25P., portion of the lands having been acquired for labourers' cottages. The purchaser shall be precluded from making any inquiry into, or investigation of, the vendor's title prior to said lease, which may be inspected at any time prior to the sale at the office of vendor's solicitor, No. 44, South Mall, and the purchaser shall be held to have full knowledge of the contents of same. The purchaser shall also assume that the lessor had full power to grant said lease, and shall be precluded from furnishing any requisition as to the lessor's title to make same. The said lands are sold subject to repayment of a Board of Works charge of £12 17*s.* 10*d.* per year, terminable in 1908, and a like charge of £5 12*s.* 8*d.*, terminable in 1916. Vendor will discharge these annuities up to the 10th day of October, 1903. No objection shall be taken by the purchaser to the fact that said lease is not registered, nor shall the vendor be required to register same."

Turpin was declared purchaser at a sale by auction, and paid a deposit of £276 5*s.* on account of the price of £1105. Title had since its date been shown to the lease of 1901, which was made to

the vendor, and the question arose as to the prior title and the right of the purchaser to raise objections founded upon it.

The solicitor for the purchaser, Mr. Stanton, stated that on the morning of, but prior to, the sale, he called on Mr. Wm. Murphy, solicitor for Denis Ahern, and inquired as to the previous title of vendor, asking in particular whether any settlement had been executed on his marriage. Mr. Murphy stated that there was no settlement on Denis Ahern's marriage, and that Denis Ahern purchased the holding for £500 from the executors of Thomas Forrest, deceased, and that the title deeds were, he believed, lying in the office of Messrs. Blake. The purchaser's solicitor stated that he would not attend the auction unless he saw the deeds. Mr. Murphy went to Messrs. Blake's and obtained the lease of the 18th March, 1865, from Sir George Colthurst to Thomas Forrest, and the assignment of the 3rd February, 1875, which he produced to Mr. Stanton.

No abstract of title was delivered, but Mr. Murphy on the 19th February, the day after the sale, handed Stanton the lease of the 18th March, 1865, the assignment of the 3rd February, 1875, and the lease of the 31st July, 1901.

On the 8th March the purchaser's solicitor received the search made in the Registry of Deeds on which a settlement, dated the 3rd February, 1875, made by Denis Ahern appeared; he thereupon called on Mr. Murphy and informed him that the new lease of 31st July, 1901, was subject to the trusts of this settlement and required same to be produced. A few days after Mr. Murphy furnished a copy of the memorial of the settlement which apparently did not set out all the trusts. Mr. Murphy stated the settlement was lost or mislaid in Messrs. Blake's office, and that he was unable to procure the original or a copy.

On the 14th March the purchaser declined to complete, and demanded the return of his deposit.

On the 16th March the vendor's solicitor wrote offering, without waiving his rights under condition 11, to procure the concurrence of the vendor's wife and children and the trustees of the settlement of the 3rd February, 1875, in the conveyance of the lands to the purchaser, so as to give him an absolute title to the tenancy granted by the lease of 1901, discharged from all equities

M. R. 1904.

In re TURPIN AND AHERN'S CONTRACT.

(if any) created by the settlement; but as one of the children was a minor, this could not be carried out.

Denis Ahern, the vendor, stated that prior to the date of the sale he had but one interview with his solicitor. He had absolutely no recollection of the execution of any settlement on his marriage until a few weeks after the sale, when his solicitor wrote stating that Mr. Stanton showed him a search on which such an act appeared registered. Having been shown the copy memorial of said deed of settlement, all he could recollect of what occurred at the time was, that it was arranged that his wife's people were to get a certain sum of money, in the event of her death within a certain period of the marriage without leaving issue who should have attained five years of age. As that contingency had long since passed, his recollection of the transaction had died out.

There was also an affidavit of Michael Ahern, who stated that at the time of the execution of the deed he read it, and to the best of his recollection and belief it contained no trusts, save those set out in the memorial.

O'Connor, K.C., for the purchaser.

F. Fleming, K.C., for the vendor.

The following authorities were referred to:—*Re Marsh and Earl Granville's Contract* (1); *Re Lyons and Carroll's Contract* (2); *Smith* v. *Robinson* (3); *Re Hughes and Ashley's Contract* (4); *Smith* v. *Whitmore* (5); *In re National Provincial Bank of England and Marsh* (6); *In re Scott and Alvarez's Contract*; *Scott* v. *Alvarez* (7); *Hume* v. *Bentley* (8); *Darlington* v. *Hamilton* (9); *Waddell* v. *Wolfe* (10); *Oakden* v. *Pike* (11).

(1) 24 Ch. D. 11.
(2) [1896] 1 I. R. 383, 390.
(3) 13 Ch. D. 148.
(4) [1900] 2 Ch. 595.
(5) [1896] 1 I. R. 520.
(6) [1895] 1 Ch. 190.
(7) [1895] 2 Ch. 603.
(8) 5 De G. & Sm. 520.
(9) Kay, 550.
(10) L. R. 9 Q. B. 515.
(11) 34 L. J., Ch. 620.

M. R.
1904.

In re TURPIN AND AHERN'S CONTRACT.

July 26.

THE MASTER OF THE ROLLS (after stating the facts):—

The lease of 1865 contained a covenant against alienation without consent. The assignment by way of settlement, in 1875, was apparently not made with any such consent, and there was no consent to the conveyance by the executors of the lessee to Ahern. If so, nothing passed to the trustees directly by virtue of these assignments, though it was argued that there might be, as I held in a recent case there was, an equitable estate by estoppel, binding upon the vendor and those claiming under him by virtue of an express or implied covenant for further assurance in the deeds, operative upon the estate of the vendor as yearly tenant after the expiration of the lease of 1865 (in 1886); and so upon the existing lease, which would be a graft upon it. This contention is, I think, right. The Conveyancing Act, sect. 7, of course does not apply, having regard to the dates.

It is, I think, the fact that whatever the settlement of 1875 contained, its primary object was to provide a jointure for the wife and a return of her fortune in certain contingencies. Marriage settlements, in the south of Ireland, are often very abnormal in their terms. The deed itself being lost, the best evidence forthcoming of its contents is the memorial for registration, corroborated in this instance by the evidence of the surviving parties to it. The memorial makes no reference to any further trusts save possibly in the phrase, "and it was thereby further covenanted and agreed upon as therein"—words which may or may not point to further trusts. The deed, as recited in the memorial, resembles a form of security for the wife's fortune, should no children of the marriage reach five years of age, more than anything else. Still it is possible, and the reference to children suggests, that being a marriage settlement it may have contained some provision for children, though I do not think it clear that it did; and unless precluded by his contract, the purchaser might reasonably require further proof of its contents, or at least a conveyance binding the right of all the children. This latter the vendor offered to give; but unfortunately one of the children is still a minor and cannot be bound. To meet this difficulty the vendor offered to allow £500 of the purchase money to remain out till the minor attains age, which will be in about a year—a most liberal

M. R. 1904.

In re Turpin and Ahern's Contract.

offer—showing his complete *bona fides*; but one which the purchaser could not be compelled to accept, assuming him to be entitled to require a conveyance by all the children.

The question then is, apart from what may be called the merits of the case, Is the purchaser entitled to require this?

Mr. O'Connor's argument was not that the correspondence or proved facts showed a waiver of the condition No. 11, nor that any fraud or misrepresentation was to be inferred on the part of the vendor in procuring the contract. He knew that the latter question, at any rate, was not one to be decided on a vendor and purchaser summons. His ground was expressly that the condition itself was not, under the circumstances, a fair and reasonable one —not "fair and explicit," in the words of the authorities. That is the question to be decided.

Now, supposing the vendor had known of the existence of the settlement, that is, had remembered it when instructing his solicitor, it would not be a matter of wonder if, believing that it did not affect the title at all, he had decided to exclude inquiry about it, not being in a position to show exactly what it amounted to. This, however, is not the case—for he had forgotten it. The other deeds are quite innocuous. Unless a vendor is to be precluded from objecting to all inquiry prior to a given date and root of title short of the regular statutory period, I cannot see that there was *prima facie* anything wrong, either morally or legally, in stipulating as in the 11th condition, provided that, under the circumstances, that stipulation was fair and explicit.

Mr. Murphy's letter of the 16th March was not wisely conceived. He ought to have made his case in it much more clearly than he did. Indeed he did not make it at all. Still, he states that when sending for and producing the deeds which were in Messrs. Blake's possession, he verbally stated that he relied on the conditions of sale, and, as I have said, a waiver of these conditions, or any modification of the contract actually made, is not relied on. The only question is whether the condition is unfair.

The authorities upon this subject are numerous, and not all apparently very consistent. It is clear, of course, that a vendor may stipulate so as to exclude any question in reference to his title prior to a particular date or deed, that is, if the trans-

action is fair and explicit. I need not canvass the oft-canvassed case of *Scott* v. *Alvarez* (1), which in one particular, viz., the question as to the return of the deposit when the vendor has failed to show title, has not satisfied the Court of Appeal in this country or the editor of Fry on Specific Performance, or apparently anybody else. That question does not arise here. The question is whether the condition is, under all the circumstances, unfair to the purchaser. In *M'Vicker's Contract* (2) a condition that the purchaser should assume that under a will (referred to) the vendor took a perpetual interest, when she only took, on its true construction, an estate for life or some other partial interest, was held to be unreasonable, and could hardly have been differently decided. The document referred to itself showed that there was no title. In *Manifold* v. *Johnston* (3) I held a condition as to an indemnity not binding under the circumstances, where the nature of the alleged indemnity appeared and was insufficient.

In the *National Provincial Bank of England* v. *Marsh* (4) (vendor and purchaser summons), before North, J., the whole of the authorities are reviewed, from the leading case of *Hume* v. *Bentley* (5) down. He discusses the doctrine of Lord Hatherley in *Darlington* v. *Hamilton* (6). He says:—"But, no doubt, the learned Judge made this observation. It is quite clear, according to the doctrine referred to and confirmed in *Warren* v. *Richardson* (7) and *Shepherd* v. *Keatley* (8), that, whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection. It is said that this covers every possible case; but I am not aware of any authority for the proposition there stated. And in Dart on Vendors and Purchasers (6th Ed., Vol. i., p. 169, n. z.), it is said:—'The doctrine laid down in the second paragraph of the judgment in *Darlington* v. *Hamilton* (6), that, whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon

(1) [1895] 2 Ch. 603.
(2) 25 L. R. Ir. 307, 311.
(3) [1902] 1 I. R. 7.
(4) [1895] 1 Ch. 190.
(5) 5 De G. & Sm. 520.
(6) Kay, 550.
(7) You. 1.
(8) 1 C. M. & R. 117.

M. R. 1904.

In re Turpin and Ahern's Contract.

the objection, appears to be too broadly stated.' I think the actual decision in *Darlington* v. *Hamilton* (1) was clearly within the authorities, the condition being only 'that the purchaser shall not require proof or production of the lessor's title, or any title prior to such lease.' But when the cases to which Lord Hatherley referred, as justifying the larger proposition which he stated, are examined, I do not think they bear out what he said."

In the present case not only inquiry but investigation is excluded, and as there is no fraudulent conduct the contract remains, unless it is invalidated on the grounds mentioned in the observations of the learned Judges in *Marsh and Earl Granville's Case* (2). The conveyance in that case with which the title was to commence was in part a voluntary deed, and the question was whether the condition that the earlier title should not be investigated and objected to was applicable.

In that case the facts were these. A contract was entered into in 1882 for the sale of freehold and leasehold premises known as the Ramridge Estate in Hampshire. The fifth clause of the agreement provided that the title to the freehold portion of the estate should commence with an indenture dated 18th October, 1845, made between Henry Gawler of the one part, and the Rev. F. J. Courtenay and Edward Harrison of the other part, and that "the earlier title, whether appearing by recital, covenant for production, or otherwise, or not appearing at all, shall not be investigated or objected to." The vendors were the devisees in trust for sale under the will of Mr. Marsh, who died on 26th January, 1881.

From the abstract of title delivered by the vendors to the purchaser, it appeared that the indenture of 18th October, 1845, with which the title commenced, was an absolute conveyance by Gawler to Courtenay and Harrison of certain freehold and leasehold properties (which included the properties comprised in the contract) upon trust for Gawler for life, and after his decease upon trust to sell the properties, and to hold the proceeds of sale on the trusts thereof declared by an indenture of even date made between the same parties. The deed contained a proviso that it

(1) Kay, 550. (2) 24 Ch. D. 11.

should be lawful for Gawler at any time thereafter by any deed or instrument in writing, executed and attested as therein mentioned, to revoke all or any of the trusts, powers, provisoes, and declarations thereinbefore declared of and concerning the trust premises, and by the same or any other such deed or writing to declare other trusts. The deed was a voluntary one, except for the consideration which resulted from the liability incurred by the trustees in relation to the leasehold part of the property assigned to them. It was held by Fry, J., and by the Court of Appeal in England, that inasmuch as the fact that the deed of 1845 was a voluntary one would influence the purchaser in determining whether he would agree to accept a title commencing within forty years, the vendors ought to have stated in the condition of sale the nature of the deed; that the omission to state this rendered the condition a misleading one; and that the purchaser was not bound by the contract to accept a title commencing with that deed. In the Court of Appeal it was argued for the vendors that the conveyance was not voluntary, because the grantee came under liability for the rent of the leaseholds, on the assumption that it made a great difference whether it was a voluntary deed or not, as a purchaser for value was presumed to have investigated the title, whereas a voluntary grantee does not. Cotton, L.J., during the argument, said:—"To my mind it is not important whether the deed was strictly voluntary or not. I think the question is whether it was a deed of such a nature that, in the ordinary course of things, the grantee would investigate the title." In giving judgment Baggallay, L.J., says:—"If the stipulation had provided that the title should commence with an indenture dated the 18th of October, 1845, which was a voluntary settlement, stating its effect, and mentioning the power of revocation, it would have been for the consideration of the purchaser whether he would submit to be bound by a stipulation of that kind. As the stipulation stands he, *prima facie*, would suppose that the indenture referred to was a conveyance to a purchaser for value, the inference from which would be that at that time the title was investigated and approved of. I do not, however, rest my judgment on the ground that that would be the idea conveyed to the purchaser in the present case, but on the ground that he ought to have had an opportunity of

M. R. 1904.

In re Turpin and Ahern's Contract.

deciding whether he would accept a deed of this description as a root of title, when the title was to commence within the statutory period. There was not, in my opinion, such a full and explicit description of the deed given as he was entitled to, and, therefore, I think the decision of Mr. Justice Fry is right." And in his judgment Cotton, L.J., says:—"Is then the stipulation one by which the purchaser ought to be bound? It is true that the time during which the title is to be shown is not limited to any great extent, but I do not think that material. Here a stipulation binding the purchaser not to require an ordinary legal title, proposes that a certain deed shall be the root of the title. In my opinion it is most material for enabling a purchaser to decide whether he will enter into such a contract, that he should know whether the deed was upon a transaction in which ordinarily there would be an investigation of the title; and if the vendor knows that the deed was on a transaction where there would be no investigation, and does not disclose that fact, the purchaser, in my opinion, has a right to complain that this fact was not disclosed by the contract. All that we decide in the present case, and all that Mr. Justice Fry decided, is, that the vendors, knowing the nature of this deed, and not disclosing it, cannot, by force of the stipulations in the contract, claim specific performance without showing a title extending over the statutory period. In my opinion the decision was right, and the appeal must fail."

Bowen, L.J., concurred.

The case was, therefore, one in which the statement that the title should commence with a deed of the 18th October, 1845, was, in fact, misleading, because it suggested that the title had, at least probably, been investigated by a purchaser at that time, whereas, the deed being in part voluntary, no investigation would naturally have taken place.

In my opinion the principle of that decision applies in the present case, although the circumstances are quite different. It is true I attribute no dishonesty to the vendor or his solicitor in not disclosing the settlement, but no more is there any suggestion of fraud in *Marsh and Earl Granville* (1). Granting that the vendor

(1) 24 Ch. D. 11.

M. R. 1904.

In re Turpin and Ahern's Contract.

has offered everything in his power to make the matter right; but I cannot bind the purchaser by anything except the contract he has made.

R. W. L.

Appeal. Nov. 1, 2. Dec. 14.

The vendor appealed (1).

Matthew J. Bourke, K.C., and *F. Fleming, K.C.*, for the appellant:—

As the lease purported to be assigned by the deed of 1875, which contained a covenant against assignment, the assignment, being without consent, was void; and the settlement by the assignee was inoperative: *Gillman* v. *Murphy* (2); *Doody* v. *Nolan* (3). The incumbrances and limitations alleged to have been created by that settlement therefore never existed; and when that lease expired in 1886, the occupier, Ahern, was in a position to take a new lease free from any equities or burthens.

The doctrine of equitable estoppel has no application, because the express ground of decision in *Gillman* v. *Murphy* (2) was that, the assignment being unlawful, the assignee was not estopped from denying its validity. As to this principle there can be no distinction in law between a legal and an equitable estoppel.

But assume the contrary, and that there may have been in the lost settlement some limitations or incumbrances which might attach to the new tenancy, that possible defect was guarded against by the 11th condition. It precluded not merely requisitions upon the vendor, but investigation about the title anywhere. Defects discovered *aliunde* were thus protected against: *Hume* v. *Bentley* (4); *National Provincial Bank of England* v. *Marsh* (5); *In re Scott and Alvarez's Contract* (6). No answer to this is afforded by *Marsh* v. *Earl Granville* (7). The ground of that decision was

(1) In the Court of Appeal, before FitzGibbon, Walker, and Holmes, L.JJ.
(2) I. R. 6 C. L. 34.
(3) 2 L. R. Ir. 199.
(4) 5 De G. & Sm. 520.
(5) [1895] 1 Ch. 190.
(6) [1895] 2 Ch. 603.
(7) 24 Ch. D. 11.

that a condition limiting a purchaser's right to less than the ordinary length of title must be fair and explicit. The vendor in that case knew that the deed given as the root of title was one in a transaction in which there would not be in the ordinary course of affairs an investigation of title. This fact was a material one for the purchaser to know in judging whether he would purchase with his ordinary right curtailed by that deed. The vendor therefore should have disclosed the nature of the deed explicitly.

That has no application here, because under the Vendor and Purchaser Act, 1874, section 2, the lease of 1901 was the proper root of title, and the purchaser *prima facie* was not entitled to go behind it. The 11th condition did not curtail the length of title to which he was entitled; it simply prevented him from going behind that by reason of any extraneous matters which might come to his knowledge. The stipulation was not one, as in *Granville's Case* (1), limiting the period for which title should be shown and withholding an explicit description of the instrument which was to have been the root of title.

In re Banister (2) was simply a decision that a condition was bad which requires the purchaser to assume as a fact what the vendor knows to be false, or states that the title is not accurately known to the vendor when in fact it is. What vitiates a condition is any representation as to facts within the knowledge of the vendor which may mislead the purchaser.

On this vendor and purchaser summons, therefore, we submit that the vendor is entitled to a declaration that a good title has been shown in accordance with the terms of the contract.

The rights of the parties in a specific performance suit might be different, because in such a suit, no matter what the conditions, the Court would not grant a decree to a vendor if the title were in fact bad, or if it was not a good holding title. The granting or refusing specific performance in such a case is a matter for the discretion of the Court: *Scott and Alvarez's Contract* (3).

(1) 24 Ch. D. 11. (2) 12 Ch. D. 131. (3) [1895] 2 Ch. 603.

Appeal. 1904.

In re Turpin and Ahern's Contract.

O'Connor, K.C., for the purchaser :—

Although the assignment of the farm was void, being made without the assent of the landlord, there may be equitable rights which would affect, if not the lands, the purchase-money in the hands of the vendor. It is impossible to speculate upon the contents of the settlement of the 3rd February, 1875. The statement of its contents in the memorial must be construed as a complete deed. If that be so, the equities that would arise would attach to the judicial tenancy created in 1894, and also to the interest under the lease of 1901. Under such circumstances a Court of Equity will not force the title on an unwilling purchaser; a purchaser cannot be made to buy a lawsuit: *King* v. *Stacey* (1). The purchaser is not precluded by the 11th condition of sale from raising the question. The rule of equity is that if there is a defect in the title within the knowledge of the vendor, he cannot preclude the purchaser from objecting to the title by conditions of sale, unless he discloses the defect in the particulars or conditions of sale in such a way as would call the attention of the purchaser to its existence: *Marsh* v. *Earl Granville* (2). This condition is unfair and misleading. If the defect is disclosed by the vendor himself, and was not discovered by any inquiry of the purchaser, the purchaser can object: *Smith* v. *Robinson* (3).

Dec. 14.

Fitz Gibbon, L.J. :—

This is an appeal from an order of the Master of the Rolls made on a summons under the Vendor and Purchaser Act, declaring that a good title to a holding comprised in a contract for sale had not been shown in accordance with the particulars and conditions of sale, and for a return of the deposit.

The property is a farm held by Ahern, the vendor, under a "future tenancy" created by a lease of July 31, 1901; formerly the farm was held under a lease of March 18, 1865, which contained a covenant against alienation, and was succeeded by a judicial tenancy, which was surrendered or merged on the execution of the existing lease.

The farm, while held under the lease of 1865, belonged to the

(1) 8 *Times* L. R. 396. (2) 24 Ch. D. 11, 24. (3) 13 Ch. D. 148.

father of the lady whom Ahern married; on his death it appears to have passed to his executors, and the beneficial interest became the property of the lady herself, or of her mother; and on February 3, 1875, it was assigned to Ahern upon his marriage, by a deed of even date with a settlement, and as part of the same transaction.

The conditions of sale to Turpin, the purchaser who issued the summons, disclose a title beginning with the lease of July 31, 1901, and they contain conditions against making any inquiry into, or investigation of, the vendor's title prior to that lease, and for the assumption that the lessor had power to grant the lease. Before the sale, which was by auction, the solicitor for the intending purchaser asked the vendor's solicitor whether there had been a settlement on the vendor's marriage, and he was told that there was not. He was then shown the lease of 1865, and the assignment of 1875. At the sale Turpin was declared the purchaser at £1105, and he paid the deposit. No abstract of title was delivered, but the lease of 1865, the assignment of 1875, and the lease of 1901 were handed to the purchaser's solicitor. Shortly afterwards searches were furnished by the vendor's solicitor which disclosed the settlement made on Ahern's marriage. The deed was not forthcoming, and its contents are known only so far as they are disclosed on the memorial, which shows that Ahern's interest in possession was cut down to a life estate, and that an annuity was provided for Mrs. Ahern in case of widowhood, without issue, with a contingent interest for her mother in case of her death within a period long since elapsed. But the memorial, in addition to these limitations, discloses only that "It was thereby further covenanted and agreed upon as therein." When this settlement turned up on the Registry search, the purchaser's solicitor said that it showed a defective title, and that, until the settlement was produced, he could not say that Ahern had more than a life estate.

It is suggested on the part of the purchaser that the lease of 1901 was a "graft" on the lease of 1865, and that the trusts of the settlement first affected the original lease, then the judicial tenancy which succeeded that lease, and finally the "future tenancy" under the lease of 1901. Upon that point I think

Appeal. 1904.

In re Turpin and Ahern's Contract.

Fitz Gibbon, L.J.

that any purchaser might reasonably apprehend that a "graft" would arise in equity. The lease of 1865 was converted into the judicial tenancy, and the judicial tenancy was surrendered for the lease of 1901. Ahern's first tenancy was under the lease of 1865; he put that tenancy into settlement; having a limited interest, and being bound by trusts, he obtained a new contract of tenancy to which equities might attach. It is, at least, not so clear that they could not, as to make it unreasonable for a purchaser to decline to take the risk.

But the lease of 1865 contained a covenant against alienation; and it is contended that, the assignment to Ahern being consequently illegal and void, the subsequent settlement by him was equally so, and could create no equity. The Master of the Rolls referred to a case—*O'Connor* v. *Foley* (1)—decided by himself, in which he held that, though such an assignment would be illegal and void, still, through a covenant for further assurance, equitable obligations might be imposed on the beneficial interest. I find it impossible to reconcile a decision that a covenant could create an equitable estate with *Doody* v. *Nolan* (2). If the assignment was illegal, the performance of the covenant for further assurance would also be illegal, and a covenant to do an illegal act could not, in my opinion, create any equity in favour of the covenantee. But though an assignment, or the creation of an estate, contrary to a covenant against alienation is void, it has been held possible to establish beneficial rights against property held under leases containing covenants against alienation: notwithstanding a covenant against alienation, equities and beneficial rights against the land, may be created. For example, it has been held that contracts for agistment, and charges, and licenses, not involving assignment of the legal tenancy, may be enforced in equity; and in this case, though there could not have been a legal assignment of the farm either to Ahern or by him, I think that equities might have been created by his marriage settlement which would bind his existing tenancy in the lands, in his hands, or in the hands of any one claiming through him with notice of the settlement.

(1) *Ante*, p. 1. (2) 2 L. R. Ir. 199.

What then would be the position of the purchaser, Turpin, if he now carried out the contract for purchase from Ahern? I assume that he would get the legal tenancy, as between himself and the landlord. But what about the purchase-money? Could Ahern give a good receipt for it? The purchaser has notice of a settlement, possibly creating beneficial equities attaching to the lands, and consequently to the purchase-money. In my opinion a Court of Equity should not force on a purchaser a title under which, if he paid the purchase-money on the receipt of the vendor, he might have to pay it again. It is not suggested that Ahern would be willing to complete the sale on the lodgment of the purchase-money in Court. It must be remembered that the vendor here was a party to the settlement, and, though he forgot it, he must be taken to have notice of all its contents. On the merits, therefore, I hold that the judgment of the Master of the Rolls was right.

But Mr. Bourke contended that the purchaser is estopped by clause 11 of the conditions of sale. It provides: "The purchaser shall be precluded from making any inquiry into or investigation of the vendor's title prior to said lease. . . . The purchaser shall also assume that the lessor had full power to grant said lease, and shall be precluded from furnishing any requisition as to the lessor's title to make same."

That condition is in accordance with the Conveyancing Act, section 3, so far as it deals with the lessor's title. The general rule is that, where a title is in fact defective, and the defect is, or ought to be, within the knowledge of the vendor, a condition against investigation will not prevent a purchaser from declining to complete, unless the condition which precludes investigation gives him some fair intimation or warning of the existence of the defect. Here the vendor, being a party to the settlement, must be taken to have known its provisions; if it created a blot on the title, he cannot estop the purchaser by the condition, unless it indicates the blot. It does nothing of the kind; he had forgotten all about the settlement, and when shown the memorial, all he could recollect was that his wife's family were to get a sum of money if his wife died within a certain time without leaving

Appeal. 1904.

In re TURPIN AND AHERN'S CONTRACT.

issue. It is most unlikely that this was the only trust of the settlement.

I think the condition was "misleading," and upon that ground also I hold that the decision of the Master of the Rolls should be affirmed with costs.

WALKER, L.J.:—

There are two questions arising on this summons under the Vendor and Purchaser Act: (1) Whether the title of the vendor is good? (2) If not good, whether the eleventh condition of sale binds the purchaser to accept the title?

The title put forward is a lease of the 31st July, 1901, for twenty-one years, and before the sale Mr. Stanton, the solicitor for the purchaser, had intimation of a title going behind that lease, and copies of the old lease and its assignment were handed to him as part of the title. The lease of 1901 is on the face of it made in consideration of the surrender of a former lease. Those documents are a lease by Colthurst to Thomas Forrest of 18th March, 1865, for twenty-one years, ending the 25th March, 1886, and an assignment of it by the executors of Forrest to the vendor, Denis Ahern, on the 3rd February, 1875. The lease of 1865 contained a covenant against alienation. There is a conflict on the affidavits as to whether before the sale an assurance was given on behalf of the vendor that no settlement was executed on his, Denis Ahern's, marriage. It is admitted the question was asked. Mr. Stanton, the purchaser's solicitor, made a search against Ahern, and discovered that a settlement had been made on the marriage of Denis Ahern with Norah Forrest on the same day that he obtained the assignment, viz. the 3rd February, 1875, whereby he purported to put the land, the subject of the sale in the present case, in settlement. The assignment and the settlement are obviously one transaction. We have no evidence of the contents of the settlement beyond what is set forth in the memorial, and it is stated that search has been made for the original without success. The memorial states the settlement was one made between Denis Ahern of the first part, Honora Forrest and Norah Forrest, her daughter, of the second part, and Michael Ahern and Michael L. Forrest, trustees, of the third part. It

recites the lease of 1865 and the assignment thereof, and purports to grant the lands to the trustees upon trust for Denis Ahern for life, and after his death to pay his intended wife a jointure of £50; and proceeds: "And upon further trust in the event of the death of the said Norah Forrest in the lifetime of the said intended husband, without leaving any issue of the said marriage her surviving, or in the event of there being issue of the said marriage living at the time of the death of the said Norah Forrest in the lifetime of her said intended husband, who should die before attaining the age of five years, and in either of such cases to pay and hand over unto the said Honora Forrest out of the rents and profits of the lands thereby assigned, or by sale or mortgage thereof, the sum of £300, and it was thereby covenanted and agreed upon as therein." Having regard to the frame of that memorial itself, and also to the presumption that arises from the fact of its being a settlement on marriage, I have no doubt that it cannot be assumed that provision was not made by the settlement for the children of the marriage, and it is admitted that the vendor is not in a position to procure the concurrence in the sale of all the children of the marriage.

It appears that Denis Ahern fixed a fair rent against Colthurst in the *status* of a present tenant, and the landlord and he had dealings, proceeding on the assumption that he was owner of the lease. But then it was contended—and this is the serious question in the case—that as the lease contained a covenant against alienation, the settlement of 1875 was wholly void, and that Denis Ahern can make a good title free from it. I think we must treat the settlement as void, so far as vesting any estate in the trustees; but it is another question whether, having regard to the memorial, there may not be an equitable interest in the children binding the lands in the hands of Ahern, or the purchase-money of them. I admit the full force of the cases of which *Gillman* v. *Murphy* (1) is a strong example, and I admit, having regard to *Doody* v. *Nolan* (2), that an action at law would not lie for breach of a covenant for title contained in a void assignment; but I am not aware of any case which decides that a vested trust or equitable interest may not arise in respect of lands

(1) I. R. 6 C. L. 34. (2) 2 L. R. Ir. 199.

Appeal. 1904. *In re* TURPIN AND AHERN'S CONTRACT. Walker, L.J.

which a settlor purports to convey, and all we can say in the present case is that the settlement contained covenants and agreements, and it cannot be assumed that interests were not given to children. The Master of the Rolls has held, in a case to which he refers (*O'Connor* v. *Foley* (1)), that a binding trust may be created against the grantor, and we know that an equitable deposit of such a lease may be made to a lender under which lands have, under certain conditions, been sold; and *Kavanagh* v. *Crowley* (2)—a decision of the Queen's Bench Division—seems to proceed on the same lines. There the lands were demised by a lease of the 11th January, 1868, from Thomas Barry to John Kiely and Jeremiah Kiely for concurrent terms of lives and years, one of the lives being in existence; and the lease contained a covenant against alienation. John Kiely survived Jeremiah, and became the owner of the leasehold interest. He had three daughters, one of whom married Eugene Crowley in 1876; but, previous to the marriage, articles were executed by which a life estate was reserved to John Kiely, with remainder to Eugene Crowley, subject to a proviso giving over the lands to his wife and children, in the event of his becoming bankrupt, or if the lands were taken in execution. John Kiely died in 1879, and Eugene Crowley, having gone into possession, fixed a fair rent on the 21st April, 1889. On the 2nd August, 1896, the Hibernian Bank obtained a judgment against Crowley, and the lands, having been sold under a writ of *fi. fa.*, were purchased by the plaintiff as a trustee for the Bank. The plaintiff brought an ejectment on the sheriff's deed. The Court, consisting of Murphy, Gibson, and Madden, JJ., held that the ejectment could not be sustained on the ground of the existence of the clauses which were binding on Crowley. I think, therefore, if we were to hold this title good we should be forcing a lawsuit on the purchaser, and that I think is a good ground of objection by him, though I agree if we, in this Court, could form a clear opinion that the title was good, we should be bound to decide against the purchaser's objection.

The remaining question is whether the eleventh condition precludes the purchaser from insisting on his objection. I think

(1) *Ante*, p. 1. (2) 33 Ir. L. T. R. 38.

Appeal. 1904.

In re TURPIN AND AHERN'S CONTRACT.

Walker, L.J.

we are bound to assume that the vendor knew of the existence of this settlement which he executed; and when we are considering whether the purchaser is precluded by the condition from raising any objection arising on the settlement, I think the test that should be applied is that laid down by Cotton, L.J., in *Marsh and Earl Granville* (1), where he says: "I think that the principle is this, that the Court will not compel a purchaser to take an estate with less than the ordinary title which the law gives him, unless the stipulation on which the vendor relies for the purpose of excluding what would otherwise be the purchaser's legal right is fair and explicit. I think that the test of its being fair and explicit is whether it discloses all facts within the knowledge of the vendor, which are material to enable the purchaser to determine whether or not he will buy the property subject to the stipulation limiting his right to the ordinary length of title." The eleventh condition in the present case does not afford that opportunity; and I think it is not, under the circumstances, fair and explicit, and does not bind. I am of opinion, therefore, that the order of the Master of the Rolls should be affirmed, and the appeal dismissed.

HOLMES, L.J.:—

If there had been no covenant against assignment in the lease of 1865, and if the conditions of sale had contained no restriction on the investigation of title by the purchaser, I should have been disposed to hold that good title has not been made to the premises agreed to be sold. The memorial in the Registry of Deeds Office shows that Denis Ahern, at the time of his marriage, purported to settle the lessee's interest in the lands demised in 1865; and if this settlement was valid, I think that the estates and trusts created thereby would have attached, not only to the yearly tenancy which came into existence at the expiration of the lease, but also to the demise substituted therefor in 1901, which is the subject-matter of the contract of sale. It is true that in so far as the contents of the settlement are disclosed in the memorial, the only person, in addition to Denis Ahern, now taking an interest thereunder, is his wife, who is willing to join in conveying to the

(1) 24 Ch. D. 24.

Appeal. 1904. *In re* TURPIN AND AHERN'S CONTRACT. Holmes, L.J.

purchaser; but it also appears from this document that the settlement contained terms not abstracted, which may have created other interests in the premises. Therefore, if this were the only matter to be considered, I would hold that the vendee is entitled to require the production of the original instrument, or at least satisfactory evidence of its contents.

Thus far I am in agreement with the other members of the Court, but I now come to the point on which I am obliged to differ from them. Every Irish lawyer knows the "severe construction," to use the words of Christian, L.J., that has been given to the 10th section of Deasy's Act. "Where any lease has been or shall be made containing an agreement restraining or prohibiting assignment, the benefit of which has not been waived before the 1st day of June, 1826, it shall not be lawful to assign the lands, or any part thereof, contrary to such agreement, without the consent in writing of the landlord or his agent thereto lawfully authorised in writing testified" in the manner specified.

Beginning with *Butler* v. *Smith* (1), case after case has given a construction of ever increasing rigour to this provision. In *Butler* v. *Smith* (1), it was held that the judgment creditor of a lessee who had assigned without consent, could take the lands in execution as against the assignee. In *Donoughmore* v. *Forrest* (2) the Exchequer Chamber decided that the landlord was not entitled to sue for rent an assignee of the demised premises, although he had verbally assented to the assignment, and although the assignee had paid, and taken receipts in his own name for, previous gales. In *Gillman* v. *Murphy* (3), the lessee was actually allowed to eject his assignee for valuable consideration on the ground that the landlord's consent had not been given in the specified manner. The argument of estoppel was in that case met by Barry, J.—"A party is not estopped from avoiding his own deed by showing that it was illegal."

In *Manning* v. *Saul* (4) it was held that a lessee, who had been compelled to pay rent, could not recover it from his assignee where the assignment had been made without consent, although the assignee had been in possession while the rent was accruing.

(1) 16 Ir. C. L. R. 213.
(2) I. R. 5 C. L. 443.
(3) I. R. 6 C. L. 34.
(4) 26 L. R. Ir. 640.

The section was very fully considered in this Court in *Doody* v. *Nolan* (1). The whole subject was then exhaustively discussed, and it was held (Christian, L.J., dissenting) that not only is the assignment without consent void, but that all covenants in the deed dependent on it are also void, and that the covenantor is not estopped from relying on their illegality. *Kavanagh* v. *Crowley* (2) does not affect the weight of these authorities. In that case there was no assignment, nor attempt to assign, and moreover it was immaterial whether the marriage articles were valid or invalid, as in either case the plaintiff would not have been entitled to recover. The matter, therefore, seems to me to be outside the region of discussion so far as we are concerned. I know that judges have sometimes applied the law as thus laid down with regret. If it were now discussed for the first time, I doubt if I should go the length of some of the decided cases; but it has been settled on authority which I have no right to question, that where a lease contains an agreement restraining alienation, an assignment, contrary to such agreement without the consent of the landlord given in the specified manner, is void and illegal to all intents and for all purposes.

Let me apply this proposition to the facts of the present case. The lease of 1865 contained a clause restraining alienation. By deed of the 3rd February, 1875, the executors of the lessee assigned the premises to Denis Ahern without the written consent of the landlord. On the same day Ahern, in contemplation of his marriage, assigned, apparently without such consent, the leasehold interest to trustees upon certain trusts of which our only knowledge is derived from the memorial. Denis Ahern has been in possession ever since. The lease expired in 1886, and some years later Ahern got a fair rent of the holding fixed in his own name. In 1901 he surrendered the statutory term thus acquired in consideration of the interest created by a new demise, the contract for the sale of which has given rise to the present proceedings. Is he now entitled to make a valid transfer of this interest to the purchaser free from the trusts that the settlement purported to create, whatever these trusts may be? I am of opinion that he is.

(1) 2 L. R. Ir. 199. (2) 33 Ir. L. T. R. 38.

Appeal. 1904. *In re* TURPIN AND AHERN'S CONTRACT. Holmes, L.J.

The clear result of the authorities to which I have referred seems to be that the assignment to Ahern and the settlement by him are wholly void, and that they have no force or efficacy by estoppel, or in any other way. If Ahern went into possession in consequence of these instruments, such possession, according to *Meares* v. *Redmond* (1), would have been lawful, though not that of tenant; and on the termination of the lease, a tenancy from year to year between him and the landlord arose by payment and receipt of rent, of which tenancy he was the absolute owner. It is said that Ahern's intended wife, who was the daughter of the original lessee, was beneficially entitled to the leasehold interest when the executors purported to assign it; but this would make no difference. In 1875 a husband had the dominion over his wife's chattels real given him at Common Law. He could go into possession of them and dispose of them by any act *inter vivos*. If this was the character of Ahern's possession, he acquired on the expiration of the lease a present yearly tenancy by virtue of the 21st section of the Land Law (Ireland) Act, 1881, which he had a right to surrender in consideration of obtaining the new lease. Therefore, *quâcunque viâ*, the interest taken thereunder was, in my opinion, his absolute property.

The Master of the Rolls has made only a brief reference to this branch of the case. He said: "The lease of 1865 contained a covenant against alienation without consent. The assignment by way of settlement in 1875 was, apparently, not made with any such consent, and there was no consent to the conveyance by the executors of the lessee to Ahern. If so, nothing passed to the trustees directly by virtue of these assignments, though it was argued that there might be, as I held in a recent case there was, an equitable estate by estoppel binding upon the vendor, and those claiming under him, by virtue of an express or implied covenant for further assurance in the deeds, operative upon the estate of the vendor as yearly tenant after the expiration of the lease of 1865, and so upon the existing lease which would be a graft upon it."

I do not know the recent case referred to; but the proposition

(1) 4 L. R. Ir. 533.

is opposed to the decision in *Doody* v. *Nolan* (1), which may be overruled by the House of Lords, but not by this Court.

Being of opinion that the vendor can make good title to the leasehold interest which he contracted to sell, I am relieved from considering the effect of the 11th condition of sale. I cannot accept the proposition that the existence of the settlement was disclosed by the vendor. The evidence shows that the memorial was discovered on a search made by the purchaser. The question is whether he is precluded by this condition from making or taking advantage of the result of such search. The Master of the Rolls held in favour of the purchaser on the authority of *Marsh and Earl Granville* (2). There are some manifest differences between that case and the present; and I am not satisfied that they are alike in principle. I offer, however, no final opinion upon a matter which it is unnecessary for me to decide.

Solicitor for the vendor: *W. Murphy.*
Solicitor for the purchaser: *J. Stanton.*

R. D. M.

(1) 2 L. R. Ir. 199. (2) 24 Ch. D. 11.

M. R.
1904.
July 19.

In re VINT & SONS, Limited.

(1904. No. 631.)

Company—Debenture—Security to Bank for advances—Interest—Right to proof for.

A Company issued to a Bank, as security for advances, six debentures of the Company for £1000 each, bearing interest at 5 per cent., accompanied by a letter of charge. The Bank charged interest on the overdraft of the Company. The Company was afterwards wound up. At the date of the winding up the Company was indebted to the Bank in a sum larger than the amount of the debentures, exclusive of interest thereon, which had not been paid:—

Held, that the Bank was entitled to interest on the debentures.

Adjourned Summons.

This was an application by Robert Walsh, the liquidator of Jonathan Vint & Sons, Limited, for the determination by the Court of the right of the Bank of Ireland to interest upon certain debentures issued to the Bank by the Company.

On July 5th, 1899, the Company, being indebted to the Bank for advances, issued to the Bank, as security, six debentures for £1000 each, bearing interest at 5 per cent., charged on the entire assets of the Company, accompanied by a letter of charge of the same date. The Company went into liquidation in December, 1902. At that date the Company was indebted to the Bank in the sum of £12,840 5*s.* 5*d.*, including interest on the Company's overdraft, but exclusive of interest on the debentures. The Bank claimed to be entitled to interest on the debentures. The liquidator stated that he had paid to the Bank sums amounting in all to £6000, representing the principal of the debentures, but disputed the claim for interest on them. The letter of charge and the other material facts are stated in the judgment.

T. Pakenham Law, K.C., and *Malcolmson*, for the Bank of Ireland:—

The Bank is entitled to the interest on the debentures, as well

as to interest on the overdraft, which has not been paid, but has been charged in the current account. If the debentures were those of another Company, there would be no question. In *In re Regent's Canal Ironworks Company* (1), where debentures of a Company were issued to a society as security for advances by discounting promissory notes, it was not contested that the society was entitled to prove for the amount due, on the debentures, with 6 per cent. interest thereon. So also in *Robinson* v. *Montgomeryshire Brewery Company* (2). These cases are referred to in Palmer's Company Precedents, 8th ed., vol. ii., p. 422.

Matheson, K.C., and *A. C. Meredith*, for the liquidator:—

There is nothing in the letter of charge as to interest on the debentures being payable. They were merely deposited as security for advances, upon which interest has been charged on account. The cases cited are not in point; and in the second case there is nothing stated in the judgment as to interest, only as to principal.

The Master of the Rolls reserved judgment.

THE MASTER OF THE ROLLS:—

This case comes before me on a summons brought by the liquidator of Jonathan Vint & Sons, Limited, to determine as to the right of the Bank of Ireland to interest on certain debentures issued by the Company on July 5th, 1899. The facts are stated in the affidavit of the liquidator, and they are not disputed. The Company were customers of the Bank of Ireland; and in the year 1899 an arrangement was made for an overdraft, which was embodied in a letter of charge of the 5th July, 1899. The agreement was for an ordinary overdraft on current account, and of course the Bank, like every other bank, charged interest from time to time, the amount to be secured by the issue of certain 5 per cent. mortgage debentures. The form of the letter of charge is material, and it is in these words:—"To the Governor and Directors of the Bank of Ireland. In consideration of your making such cash advances, and transacting such banking

(1) 3 Ch. D. 43. (2) [1896] 2 Ch. 841.

M. R. 1904. *In re* Vint & Sons.

business from time to time at the Bank of Ireland, or any of its offices, to or for the account of the Company known as Jonathan Vint & Sons, Limited, as the said Company may require, and as you may approve, the said Company have issued to you six first mortgage debentures of £1000 each (forming part of a series of first mortgage debentures of the Company amounting to £10,000, and numbered 1 to 6 in the books of the Company), to be held by you as collateral and continuing security for such advances and transactions, and to be charged with the amount of such advances and transactions. And the said Company hereby authorise you to sell the said debentures or to realize them in any way you may think best, and to apply the proceeds towards payment of any sum or sums that may appear due to you by the said Company on account of such advances or transactions, with interest at 5 per cent. or bank current rate, whichever the said Governor and Company may require at any time you may consider it desirable to do so. And the said Company hereby undertake to do all acts necessary to enable you to carry out such sale, or that shall be needful to perfect such collateral security, which it is understood and agreed shall extend to any balance that may appear due by the said Company to you on foot of bills or overdrawn account, including any money due on bills current."

It bears the seal of the Company, and is signed by Jonathan Vint and John Vint, Directors, and countersigned by R. T. Blackburn, Secretary.

This instrument of charge was dated the same day as the debentures which were handed to the bank. I have one of them before me; but nothing turns on the form of the debenture. It is merely a mortgage of all the Company's property to secure the payment of the principal money mentioned in the debenture and interest at 5 per cent. The Company's account was always in debit. There was never at any time a credit balance in its favour. The bank book was balanced every half-year, and at the half-yearly settlement interest was calculated and added in to the current account. I have been furnished with one of these bank books. It extends over the period between June, 1901, and December, 1901, and includes two half-yearly balances. On the 29th June, 1901, the total amount of debit entries against the

Company was £17,751 9*s.* 8*d.* The credits fell short of this by £4417 10*s.* 1*d.*, being the amount due on balance of the account; and in calculating the amount of the debit, interest on the overdraft, £204 14*s.* 8*d.*, was charged to the Company, and formed part of the sum of £4417 10*s.* 1*d.* carried to next account. The next settlement was in December, and in the same way the balance due by the Company amounted to £8067 15*s.* 7*d.*, and that balance included a charge for interest amounting to £169 14*s.* 3*d.* It was contended, in argument, that interest on the current account was by this course of dealing regularly paid. Nothing of the kind took place. There was no payment of interest, but the account ran on continuously from beginning to end, except that interest was struck half-yearly, and charged to the account. The result, no doubt, was that in charging interest, and carrying on the balance to next account, and charging interest on the whole, the bank charged compound interest; but I have nothing to do with that. Interest, however, was regularly charged on the sum carried over. Taking the balance at the end of June, 1901, it was £4417 10*s.* 1*d.*, which it is said was actually wiped out by a cash payment in the following July. By the 11th of that month sums amounting to £4525 2*s.* 4*d.* had been paid in to the credit of the Bank. It was suggested that this sum wiped out the balance to debit; and so it would have done if nothing had happened in the meantime; but the advances going on overbalanced the amount of the credits, and there is no reason why, owing to any contract between the parties or any arrangement, any portion of the lodgment to credit paid in before July 11th should be specifically applied to the payment of interest. The sum of £204 14*s.* 8*d.* charged for interest might have been paid by the Company by their own cheque; and if they had given their cheque, it would appear in the current account. It was not done by cheque, but by entering the interest in the book. The result was that in the account carried down to the time embraced by this inquiry the account was always in debit and contained half-yearly charges for periodical interest. The question which arises is this:—The Company say that the interest must be taken to have been paid (by appropriating the next lodgment to that), and that therefore the Bank are not entitled to prove for the principal due on

M. R. 1904. *In re* Vint & Sons.

balance of the ordinary account, and also for interest on the debentures, alleging that they are not entitled to charge interest both on the current account and on the debentures.

This looks plausible; but it is unsound. The claim of the Bank cannot be disputed. Assuming that the claim is correctly stated, the arrangement was that the debt was to be secured not only in respect of advances already made, but also in respect of any subsequent advances and of any balance that might be found due. The question is therefore not what is due, but on what is it secured? That is, whether the Bank, as holders of these 5 per cent. debentures, are entitled to prove for the whole amount of the debentures and interest thereon (not receiving more than 20*s.* in the £ on foot of their debt) or only for the principal or face-value of the debentures without interest thereon. The debentures, with the interest thereon, were security for the whole debt. On the one hand, there is a debt, and on the other, a security for the debt, consisting of the mortgage and interest. The claim of the Bank is right. If they are entitled to prove for the principal amount of the debentures, they are exactly in the same way entitled to prove for the accrued interest thereon, up to the limit I have mentioned. If the debentures had been issued to a creditor, not as security, but in discharge of his debt, without any question he would be entitled to the entire interest. This is common justice, irrespective of authority, which is scanty.

It was said by the Bank that there were two authorities in their favour; but I cannot say that they appear to me to be very distinct upon the question. No cases, however, of a contrary tendency were referred to; and, so far as they go, especially the *Regent's Canal Ironworks Company's Case* (1), they are in favour of the contention of the Bank, though neither of the cases can be claimed as a decision on the point. These two cases are referred to in Palmer's Company Precedents, 8th ed., vol. ii., p. 422. The case of the *Regent's Canal Ironworks Company* (1) turns on facts which have no bearing upon this case. The question there was whether holders of certain debentures were entitled to prove at the rate of £95 for every £100, or whether the debentures should stand

(1) 3 Ch. D. 43.

for their full face value of £250. The question arose between two sets of debenture-holders. Malins, V.-C., allowed the claim on the debentures for their full amount with interest thereon; and the form of order settled by the learned Judge himself shows distinctly that the interest formed part of the security. The Vice-Chancellor says:—"The proper form of order will be: the Court being of opinion that the Financial Society is entitled to prove for the amount due on the forty debentures transferred to them, with 6 per cent. interest thereon, *pari passu* with the holders of the remaining sixty, but is not to receive more in the whole than what is due to them for principal, interest, and costs, in respect of the £8000 advanced by them with 10 per cent. interest, let the matter be referred to Chambers for an account to be taken accordingly." This case was the subject of an appeal, and on the appeal I do not find that the present question was referred to. James, L.J., said he did not see his way to alter the order of the Vice-Chancellor "in any respect." Mellish and Baggallay, L.JJ., were of the same opinion. It would, perhaps, be going too far to say that that was a decision on the question before me; but the Court of Appeal went out of their way to express concurrence with the Vice-Chancellor's decision and order "in every respect." That case was decided in 1876, and, although it is now twenty-eight years ago, nothing has occurred since that I know of to indicate that any contrary opinion has been established by any Judge or text-writer. But, having regard to the order which is so specific, anyone who wished to know the rights of debenture-holders would see that it establishes a rule which ought to govern a transaction of this kind. The other case cited—*Robinson* v. *Montgomeryshire Brewery Company* (1)—was decided in 1896, and that case cannot be said to decide this question at all. It was a curious case. The Company in it instructed their broker to obtain a loan for £3000 on the security of £8000 of its debenture stock. The broker asked one Gillies to lend £6000 on the stock, and he consented to do so on the certificate for the £8000 stock being deposited with his bankers. The secretary deposited as required a certificate stating that Gillies was the registered holder of £8000 debenture stock. Gillies paid

(1) [1896] 2 Ch. 841.

M. R. 1904. *In re* VINT & SONS.

£6000 to the broker, who paid the Company only £3000. The question there was, whether in the liquidation Gillies was entitled to prove for £6000 secured by the £8000 debenture stock, which it was sought to cut down to £3000, as authority was given by the Company to their broker to borrow £3000 only. The case was discussed on the general ground that where the transaction is equitable in its nature no priority could be gained by Gillies, and that, therefore, he took subject to the prior equity between the Company and the broker. The Court held that the issuing of the certificate for the debenture stock under the circumstances amounted to an authority to the broker to deal with it, and that on that ground, and on the principle of *Rice* v. *Rice* (1), the ordinary rule as to priority of time did not apply. That has no resemblance to the facts of this case. Gillies, however, claimed to prove for £8000, and the dividends thereon, and the claim as a whole was allowed, but without discussion on this point; and Vaughan Williams, J., said:—"In my judgment Mr. Gillies is entitled to prove for £8000 until he shall have received dividends for £6000," not specifying interest on either. In *Fitz Patrick Brothers* (2), a case in this Court in the year 1900, a claim was made and allowed under circumstances similar to the present, but it could not be relied on as any authority, because the matter never came before the Court, the claim being allowed in Chambers, and payment made without dispute. Apart, however, from decision, the Bank had as security for the overdraft the debentures and interest thereon. That was the contract; and, therefore, I think the Bank is plainly entitled to succeed.

Solicitor for the Bank of Ireland: *C. J. Rutherfoord.*
Solicitors for the liquidator: *J. C. White & Co.*

W. L.

(1) 2 Drew. 73.

(2) Not reported.

BURKE *v.* POWER.

(1904. No. 613.)

M. R.
1904.
Nov. 21.

Will—Construction—Gift for Masses, validity of—Pious use—Perpetuity—Charge on land—Chattel real—Personalty—Death of testator within three months next after execution of will—Charitable Donations and Bequests Act (7 & 8 *Vict. c.* 97), *s.* 16—*Catholic Relief Act* (10 *Geo.* 4, *c.* 7).

A testator (who died within three months from the date of the execution of his will) directed his interest in a farm of land to be sold, and out of the proceeds of the sale a sum of £200 to be set apart and given to the parish priest and curates of Cahir Roman Catholic Church to be invested by them; the principal to remain invested for all time in the names of the successive parish priests and curates of Cahir, the interest thereof to be applied in saying Masses for the repose of testator's soul. After bequeathing a pecuniary legacy, the testator gave the rest, residue, and remainder of his property to the Abbot of M., and the Franciscan Friars in C. in equal shares for the purpose of having Masses said for the repose of his soul in M. and C.

At the dates of the execution of the will, and of the death of the testator, the same person was Abbot of M., and the same three Franciscan Friars were resident in C.:—

Held, (1) that the legacy of £200 was void as a charge upon lands under sect. 16 of the Charitable Donations and Bequests Act (7 & 8 Vict. c. 97).

Held, (2) (in reference to the gift of the residue so far as it consisted of pure personalty) (*a*) that there was a gift of one-half to the person who filled the office of Abbot of M. at the date of testator's death in his individual capacity for the offering up of Masses, and that same was valid; (*b*) that there was a gift of the other half for the offering of Masses to a specified body, because they were members of the Order of Franciscan Friars bound by monastic vows, which was void as contrary to the policy of the Catholic Relief Act (10 Geo. 4, c. 7).

ORIGINATING SUMMONS.

Thomas Tobin, by will dated 5th February, 1904, directed that his interest in a certain farm should be sold by his executors, and that out of the proceeds of the sale a sum of £200 should be "set apart and given to the parish priest and curates of the parish of Cahir Roman Catholic Church, to be invested by them, the

M. R. 1904.

BURKE v. POWER.

principal of the sum so invested to remain for all time in the names of the successive parish priests and curates of Cahir, the interest thereof to be applied yearly in saying Masses for the repose of my soul in the Roman Catholic Church at Cahir. I give all the rest, residue, and remainder of my property to the Lord Abbot of Mount Melleray and the Franciscan Friars in Clonmel, in equal shares, for the purpose of having Masses said for the repose of my soul in Mount Melleray and Clonmel." Testator appointed the plaintiffs executors of his will. He died 8th April, 1904, and probate of his will was granted to the executors on 20th April.

At the date of the will and at the date of the death of testator the Right Rev. John C. Delaney was Lord Abbot of Mount Melleray, and on those respective dates the Franciscan Friars in Clonmel were the Rev. J. Kelly, the Rev. P. Corish, and the Very Rev. J. B. Cooney.

W. G. Gibson, for the plaintiffs, the executors of the will.

D. F. Browne, K.C., for the Lord Abbot of Mount Melleray.

The bequest of the share of the residue to the Lord Abbot of Mount Melleray is a valid bequest of the share of the residue, so far as it consists of pure personalty to the individual who, at the time of the testator's death, filled that office: *Bradshaw* v. *Jackman* (1). The legatee is described by reference to the office, but the bequest is to him individually, and not in any *quasi* corporate capacity. There is no bequest "to or for his successors in the office" nor "for the members of the community of Mount Melleray," nor is there any attempt to create a perpetuity for a pious use. The testator intended that one-half of the residue should go to the Lord Abbot, inasmuch as he bequeaths the residue in equal shares for the purpose of having Masses celebrated at two churches—one at Mount Melleray, the other at Clonmel.

O'Connor, K.C., for the Franciscan Friars:—

The gifts to the Abbot and the Franciscan Friars are gifts to them in their personal capacity without any trust imposed on them.

(1) 21 L. R. Ir. 12.

They are made legatees in their individual capacities, and not as representing communities; and so the Abbot cannot take one-half of the bequest and the Franciscan Friars the other half, but they must be treated as individuals, with the result that one-fourth of the residue goes to the Abbot, and one-fourth to each Franciscan Friar. There is no obligation on any one Franciscan Friar. He may or may not apply it to religious or monastic services.

C. W. Corvan, for the next-of-kin:—

The bequest of £200 out of the proceeds of the sale of the farm is void under the 16th section of 7 & 8 Vict. c. 97, as the testator died within three months from the date of the execution of his will: *Boyle* v. *Boyle* (1); *Dillon* v. *Reilly* (2).

As regards the residuary gift, so far as same included chattels real, the gift is, without question, void.

And, so far as the residue consists of pure personalty, it is also void, because it is given to the Abbot of Mount Melleray and the Franciscan Friars in Clonmel in their *quasi* corporate capacities for the benefit of the institution or order in each case, and contravenes the policy of the Roman Catholic Emancipation Act (10 Geo. 4, c. 7): *Attorney-General* v. *Hall* (3); *Richardson* v. *Murphy* (4); *Cocks* v. *Manners* (5); *Fanning* v. *Fricker* (6).

The gift to the friars is one which manifestly tends to support the Franciscan Order, and it is given to them because they are members of the Order of St. Francis, which is a monastic community bound by vows, and, therefore, one to which the provisions of 10 Geo. 4, c. 7, are applicable: *Sims* v. *Quinlan* (7).

THE MASTER OF THE ROLLS:—

I do not entertain any doubt about the first question, because the legacy of £200 is to be set apart out of the proceeds of the sale of lands "and given to the parish priest and curates of the parish

(1) I. R. 11 Eq. 433.
(2) I. R. 10 Eq. 152.
(3) [1896] 2 I. R. 291; [1897] 2 I. R. 426.
(4) [1903] 1 I. R. 227.
(5) L. R. 12 Eq. 574.
(6) 38 Ir. L. T. R. 235.
(7) 17 Ir. Ch. R. 43.

M. R. 1904. BURKE v. POWER.

of Cahir (Roman Catholic), to be invested by them, the principal of the sum so invested to remain for all time in the names of the successive parish priests and curates of Cahir, to be applied yearly in saying Masses for the repose of my soul in the Roman Catholic Church of Cahir." As regards this legacy, I must declare it to be void as a charge upon lands under section 16 of the Charitable Donations and Bequests Act (7 & 8 Vict. c. 97), as the death of the testator occurred within three months of the date of his will.

The next question turns on the gift of the residue. The words are:—"I give all the rest, residue, and remainder of my property to the Lord Abbot of Mount Melleray and the Franciscan Friars in Clonmel, in equal shares, for the purpose of having Masses said for the repose of my soul in Mount Melleray and Clonmel." The language is, perhaps, ambiguous. Perhaps there are two constructions open, one being that the property is to go to the Lord Abbot of Mount Melleray and the Franciscan Friars (if they could be ascertained), and be divided amongst them all as one body, or rather as so many individuals, so that the Abbot and the Franciscan Friars would take each one equal share. The other interpretation would be that the property was intended to be divided into two shares—one share to go to the Abbot, and the other to the Franciscan Friars—for the purpose of having Masses said at Mount Melleray and at Clonmel for the repose of testator's soul.

I have no doubt that the latter is the true meaning, and that the Abbot is intended to take one half, and the Franciscan Friars, as a body, the other half, and that it is not divisible among the Franciscan Friars as *personæ designatæ*. Then the question arises as to the validity of the gift as a pious use, and, so far as the legacy consists of real estate or chattels real, it is void under the statute; but, so far as it consists of pure personalty, that objection does not apply. I cannot read the disposition as a perpetual gift to the persons who from time to time and for the time being should fill the office of Lord Abbot of Mount Melleray, with the view of creating a perpetuity; but I think it is to be read as a gift to the individual filling the office at the time of the death of testator; and in this case the Lord Abbot was the same person at the respective dates of the will and of the death.

If so, we have the description of an individual as the legatee, and there is no direction that his share of the residue is to be brought into a common fund, or in any way to be disposed of by anyone else except himself, though it is directed to be expended for the purpose of Masses. I cannot hold that there is anything more than the creation of a trust binding on the individual to have Masses said for the repose of testator's soul. There is then no question of perpetuity, and the Abbot of Mount Melleray takes it once and for all, subject to the obligation on him to apply it for Masses.

As regards the other portion of the residue, it stands on an altogether different footing. It is an attempt to give to a specified body of Franciscan Friars a legacy, because they constitute a monastic establishment, and as such are members of the Franciscan Order, to provide for the celebration of Masses.

Is that legacy void under the provisions of the Catholic Emancipation Act as being given to an institution bound by monastic vows? Whatever I may think as to the policy of that legislation, I have nothing to do except to say that such a legacy as the present is clearly void under the statute, and I so hold.

Solicitor for the executors: *George H. Sargent.*
Solicitor for the next-of-kin: *Richard A. Macnamara.*
Solicitors for other parties: *Hogan & Son.*

R. W. L.

M. R.
1904.
Nov. 16.

HEENEY *v.* WHITE.

(1904. No. 337.)

Judgment mortgage—13 & 14 *Vict. c.* 29, *s.* 6—*Cloud on title.*

The Court has jurisdiction to make a declaration that a judgment registered as a mortgage against lands, in which the judgment debtor has no interest, does not affect those lands.

Hone v. *O'Flahertie* (9 Ir. Ch. R. 497) followed.

TRIAL OF ACTION.

This action was brought for a declaration that the registration of a judgment as a mortgage against the lands of Gaffney Little and Bellewstown was null and void. The material facts of the case, which are also referred to in the judgment, were as follows:—

On March 12th, 1900, Robert J. Heeney and Margaret Mary Heeney, his wife, entered into an agreement with Dr. C. B. Ball for a loan by him to them of £3500 on the security of the lands mentioned in the first and second schedules to the agreement. There was a recital that the borrowers were entitled in fee to the lands mentioned in the first schedule, subject to the annuities to the Land Commission therein mentioned. The lands in the first schedule were described as follows:—"The lands and residence known as Gaffney Park, containing 77A. 2R. 26P. statute, situate in the barony of Duleek, in the county of Meath, subject to an annuity of £59 5*s.* 8*d.* payable to the Irish Land Commission, to be reduced and extinguished in thirty-seven years from the present time; the lands of Bellewstown, containing 26A. 2R. 13P. statute, situate in the same barony and county, subject to an annuity of £38 payable to the Irish Land Commission; other lands adjoining said lands of Gaffney Park, containing 6A. 2R. 6P. statute, situate in the same barony and county." The lands in the second schedule were described as "The dwelling-house and lands of Tullyvalley, or Oldbridge, or Obelisk farm, containing

180A. 2R. 13P. statute, situate in the barony of Ferrard and county of Louth, held under judicial lease, and subject to the yearly rent of £180." The agreement provided for payment of the lender's costs by the borrowers in the event of the loan falling through for any reason other than the wilful refusal of the lender to complete. The defendants in this action, Messrs. White & White, solicitors, acted for the lender in the matter of the loan.

An abstract of title was furnished to the defendants by the solicitor for the borrowers, but the title was not investigated, as the borrowers' solicitor afterwards informed the defendants that the lands of Bellewstown were not held in fee-simple, but under a judicial lease, and the loan was broken off on this ground. The defendants' taxed costs amounted to £17 8*s.* 8*d.* R. J. Heeney having neglected to pay these costs, and his wife having died, the defendants brought an action in the King's Bench Division of the High Court against R. J. Heeney, and recovered judgment on November 14th, 1902, for £17 8*s.* 8*d.* and £2 4*s.* for costs. On January 3rd, 1903, this judgment was registered in the Registry of Deeds Office, Dublin, as a mortgage against the interest of R. J. Heeney in the lands of Gaffney Little, known as Gaffney Park, pursuant to 13 & 14 Vict. c. 29. The affidavit required by section 6 of that statute was made by William Grove White, one of the defendants, in the absence of his brother, the defendant, R. Blair White, who had charge of the matter, and stated, in the words of section 6, that to the best of his knowledge and belief the said R. J. Heeney was seised or possessed at law or in equity, or had disposing power which he might, without the consent of any other person, exercise for his own benefit, over certain lands thereinafter mentioned, that is to say, that part of the lands of Gaffney Little, known as Gaffney Park, in the barony of Duleek, in the rural district of Drogheda, No. 2, and in the county of Meath, held in fee-simple. The defendants were both examined at the trial; the defendant, William Grove White, stated that at the time he *bona fide* believed that R. J. Heeney had an interest in the lands. He admitted that he did not read the abstract of title before making his affidavit, but stated that he took the recitals in the agreement as to the lands of Gaffney Park to

M. R. 1904.

HEENEY v. WHITE.

be correct, and that the affidavit was prepared from the schedule to the agreement. He only included in the affidavit the lands which were held in fee-simple.

It appeared from the abstract of title that R. J. Heeney had no beneficial interest in the lands of Gaffney Park, but that they belonged to his wife. They were originally held by James Lynch, her father, under a lease for a term of years, and were bequeathed, in the year 1872, by his will to her for her separate use, free from the control of her husband, R. J. Heeney, and without power of anticipation. James Lynch died in 1875, and Margaret Heeney, in 1882, obtained letters of administration of his estate and effects with the will annexed. R. J. Heeney was in occupation of the lands and rated for them, and was recognised by the landlord as the tenant. On February 11th, 1889, the lands were conveyed by the landlord to R. J. Heeney, in fee-simple, subject to an annuity of £66 payable to the Irish Land Commission. On February 22nd, 1895, R. J. Heeney and his wife mortgaged the lands *inter alia* to P. J. Plunkett. The mortgage recited the deed of February 11th, 1889, and that it was made to R. J. Heeney as trustee for his wife, who was absolutely entitled thereto. On December 5th, 1896, R. J. Heeney executed a deed of declaration of trust in favour of his wife, but this deed was not mentioned in the abstract, and was first brought to the defendants' knowledge by a letter of the solicitor of the plaintiffs of December 7th, 1903. Margaret Heeney by her will left all her property in equal shares to her children, James Lynch Heeney, Mary Julia Heeney, Robert Patrick Heeney, and Margaret Joseph Heeney, the present plaintiffs. They, the present plaintiffs, being desirous of raising money to pay off the mortgage above-mentioned, entered into an agreement for a loan with the late James M'Cann. A search having been made in the Registry of Deeds, this judgment appeared on the search, and the solicitor for the lender required the judgment to be vacated. The solicitor for the plaintiffs thereupon wrote to the defendants on December 7th, 1903, stating the facts, and offering to show them the declaration of trust above-mentioned, and asked them to vacate the judgment, as it was a blot upon the plaintiffs' title, which they desired to register under the Local Registration of Title Act. The defendants declined to comply with the plaintiffs' request,

except on payment of the amount of their claim for principal, interest, and costs. After some correspondence this action was brought.

Ignatius O'Brien, K.C., and *W. H. Brown*, for the plaintiffs:—

The judgment does not affect the lands, which are the property of the plaintiffs, and in which R. J. Heeney had no interest; but it is a cloud on their title, which the Court has jurisdiction to remove: *Hone* v. *O'Flahertie* (1), where the authorities on the subject are collected and considered.

F. N. Greer, for the defendants:—

Hone v. *Flahertie* (1) was a different case. Relief was given there, because of the unconscientious conduct of the defendant. The defendant there having got a judgment against the official manager of the Tipperary Bank, registered an affidavit of the judgment against the real estate of the plaintiff, a former shareholder in the Bank, without having issued a *scire facias* against him. The cases referred to in *Hone* v. *O'Flahertie* (1) were cases of annuity deeds, which were void because not registered pursuant to the statute 17 Geo. 3, c. 26, s. 4, as in *Bromley* v. *Holland* (2), and *Davis* v. *Duke of Marlborough* (3). Here the original registration of the affidavit was lawful, as the defendant honestly believed that the judgment debtor had an interest in the lands. The words of 13 & 14 Viet. c. 29, s. 6, are: "And the creditor shall know or believe that the person against whom such judgment is entered up is seised or possessed of any lands. . . ." If the original registration was lawful, there is no case in which the Court has ordered the cloud so created to be removed. The Act provides no machinery for correcting mistakes, except by section 9, which provides that if a judgment has been satisfied, a memorandum of satisfaction may be entered in the registry. The defendants are willing to give a deed of release and let it be registered, but not at their own expense. If the plaintiffs are entitled to a declaration of title, it should be granted at their expense, and not at that of the defendants.

(1) 9 Ir. Ch. R. 119, 497. (2) 7 Ves. 3. (3) 2 Swan. 157.

M. R. 1904.

HEENEY v. WHITE.

If the judgment creditor has made a *bona fide* mistake, it cannot be put higher than a slander of title, viz. an assertion that some one other than the plaintiffs has an interest in the lands. But *bona fide* belief and absence of malice is a good answer to an action of slander of title: *Pitt* v. *Donovan* (1); *Halsey* v. *Brotherhood* (2), an action analogous to slander of title brought against the holder of a patent for issuing notices against purchasing certain articles, alleging that they are infringements of his patent. The defendant was not bound to read the abstract of title before he made the affidavit; but even if he had read it, he might have made the affidavit all the same, as he would have found that the lands were conveyed to R. J. Heeney, in fee, and that he and his wife mortgaged them to Plunkett.

W. H. Brown, in reply:—

The action was necessary, as the defendants refused to clear the title except on payment of principal, interest, and costs. They now say they are willing to release the lands at the plaintiffs' expense. Even if the defendants believed that R. J. Heeney had an interest in the lands, that should have been set right by the letter of December 7th, 1903, which put them on inquiry. There is no claim for damages here, only for a declaration that the judgment does not affect the lands. The principle recognised in *Hone* v. *O'Flahertie* (3) shows that the Court has jurisdiction to make such an order to remove the blot on the title.

THE MASTER OF THE ROLLS:—

There is not much disputed fact in this case, which arises on the right of the defendants to effectuate a judgment mortgage for the small sum of £19 12*s.* 8*d.* The title to the lands against which the judgment was registered as a mortgage appears to be very clear, but there is no doubt also that an element of confusion arose from the fact that one R. J. Heeney treated himself as owner. He was also the occupier and rated as such, and was recognised by the Land Commission as tenant. That circumstance was calculated to mislead anyone dealing with him. But the real

(1) 1 M. & S. 639. (2) 19 Ch. D. 386. (3) 9 Ir. Ch. R. 119, 497.

title to the lands appeared from the other documents. He had no interest whatever in the lands, which were left by the will of his father-in-law, James Lynch, not to Mrs. Heeney, for life with remainder over, but in clear language the will gave the whole interest in them to her for her separate use, free from the debts and control of her husband, and with a restriction on anticipation. Therefore she could not deal with the lands, nor authorise her husband to deal with them. She could only dispose of them by will, which she did in favour of her four children, the plaintiffs, and they have nothing to do with the matter in question. They, however, claim in a sense through her, and may be affected by the contract she entered into. On March 12th, 1900, an agreement for a loan was entered into between R. J. Heeney and his wife with Dr. Charles B. Ball, now Sir Charles Ball, for a mortgage of certain lands mentioned in the schedules to the agreement, in order to pay off prior mortgages upon them. Two sets of lands were comprised in the schedules: firstly, the lands of Gaffney Park and Bellewstown, in which R. J. Heeney had in fact no interest, although the agreement recited that the borrowers (*i.e.* R. J. Heeney and wife) were entitled to them in fee-simple, subject to the annuities to the Irish Land Commission mentioned; and secondly, the lands of Oldbridge, held under a judicial lease, which were the property of R. J. Heeney. The loan fell through owing to a defect in the title to the lands of Bellewstown, which were not held in fee as stated, but only under a statutory tenancy. One of the conditions of the contract was that, if the loan was broken off for any cause but the wilful refusal of the lender to complete, the borrowers were to pay the costs and expenses of the lender. These costs were drawn at a moderate sum, and came to £17 8*s.* 8*d.* when taxed, and formed the consideration for the judgment which was obtained against R. J. Heeney by the defendants after Mrs. Heeney's death. R. J. Heeney is responsible for the amount of this judgment, but the question is whether the defendants can enforce their claim under it against the plaintiffs. No one who knew the defendants would think of imputing to them any improper conduct, and the case is not put in that way; but it is said that the registration of the judgment is a blot on the title of the real owners of the lands of Gaffney Park and Bellewstown, who are free from any

M. R. 1904.

HEENEY v. WHITE.

sort of relation with the defendants. It was an innocent mistake of the defendants, but it was a mistake. They could have registered the judgment against the lands of Oldbridge, which were the property of R. J. Heeney. The reason Mr. Grove White gave for not registering the judgment against these particular lands was that, for the sake of £20, he did not wish to make himself liable to a rent of £180. How he would become liable as judgment mortgagee, I need not stop to inquire, but he was, I think, rather too cautious as to that. What he did was wrong in substance, because R. J. Heeney had no estate whatever in those lands, being excluded from them by James Lynch's will, the second document in the abstract of title. I think that the mistake was largely caused by the fact that Mr. Blair White, who had charge of the matter, was absent in Australia when Mr. Grove White made the affidavit. I quite accept what Mr. Grove White says, but I do think he was a little hasty in making the affidavit, as anyone who read the abstract of title must have seen that R. J. Heeney had no title to the lands. The solicitors for the late Mr. James M'Cann, who negotiated for a loan to the plaintiffs, discovered, as the result of a search in the Registry of Deeds, this judgment mortgage against the lands. They objected to this charge, and said that it must be cleared off. This was ultimately arranged by retaining the sum of £39 to cover not only this claim of about £20, but also another claim with which I have nothing to do. On attention being called to this blot, the plaintiffs' solicitor pointed out to the defendants that the statement in their affidavit was erroneous, and that R. J. Heeney had no title to the lands mentioned in the affidavit, and he asked them to remove this blot. The plaintiffs' solicitor asked to have the mortgage vacated. That was not an accurate expression, but similar words were used in *Hone* v. *O'Flahertie* (1), where the Lord Chancellor speaks of vacating the affidavit of registry. Everybody knew what was meant, that is, to have the title to the lands cleared, but not in any way to interfere with the judgment against R. J. Heeney. This appears from the defendants' letter, in reply, of December 8th, in which they

(1) 9 Ir. Ch. R. 130.

said:—"Either the judgment mortgage is ineffectual, as alleged by you (in which case it can do your clients no harm), or it is effectual, as we contend, and we cannot see why in either event we should be called upon to vacate the registration as demanded by you. We may add that on payment of the amount due for principal, interest, and costs, we will, of course, be willing, on the usual terms, to execute the necessary vacate to clear the title and hand over all the documents in our possession relating to the property." That means, if you (the plaintiffs) will pay the debts of another person, we will vacate the judgment on the usual terms. The question then is, as between the two parties, What is to be done to clear the title?

The Act of Parliament did not provide for this state of things, but only for the case of a judgment being satisfied. But the event of its turning out that the party against whom the judgment has been obtained has no interest in the lands against which the judgment is registered does not appear to have been provided for. The only way it can be done is by a reconveyance, or by a declaration made in a properly constituted suit, which will bind the party who registered the judgment as a mortgage. The plaintiffs say, you (the defendants) put this blot upon our title; you must get rid of it at your own expense. The defendants say that they have only done what the Act of Parliament allows them to do, and that they acted in good faith and without malice, and that whatever has to be done must be done at the expense of the plaintiffs. There is thus only a question of costs between the parties. Till the action was brought the defendants took up a wrong attitude; but by the last paragraph of their defence they say that they offered, and are still willing, at the plaintiffs' expense to execute a proper deed releasing the lands from the judgment mortgage. In considering the question of costs, I cannot shut my eyes to the fact that the plaintiffs claim under Mrs. Heeney, and she was a party to the agreement by which she contributed to mislead the defendants. The will left the property to her absolutely. She did everything she could to enable her husband to appear to be and to be treated as owner. He obtained a conveyance from the Land Commission in his own name. Although there was some want of caution on the part of the defendants in registering

M. R. 1904. HEENEY v. WHITE.

the judgment against the lands, still I think that Mrs. Heeney directly contributed to that. She did all she could to mislead the defendants, and the plaintiffs claim as volunteers under her.

Then, have I jurisdiction to do anything at all? It is plain from *Hone* v. *O'Flahertie* (1)—a decision of the highest tribunal in this country—that this Court has jurisdiction to correct and set right anything which is *prima facie* a blot on the title to the plaintiffs' lands. The decision in *Hone* v. *O'Flahertie* (1) went on the ground that the registration of the affidavit was a fraud on the statute, but it was laid down by the Court that the jurisdiction to remove a cloud on the title of a party existed. That being so, the question is, What ought I to do? Mr. O'Brien says that I should make an order that a deed should be executed by the defendants, which could be registered. I do not think that it is necessary to incur that expense, which would be useless. I think that it is sufficient, in a properly constituted suit such as the present, to make a declaration that the judgment mortgage does not affect the estate and interest of the plaintiffs in the lands. An attested copy of such an order will be conclusive that the judgment mortgage does not affect the property of the plaintiffs, and may be indorsed upon the deed. I shall not go further and order the execution of a deed, inasmuch as an adverse decree in a properly constituted suit will be as good a protection to the plaintiffs as a deed. As regards the costs, having regard to the conduct of Mrs. Heeney and of the defendants, to which I have referred, I shall leave each party to abide their own.

The Master of the Rolls made the following decree, which may be indorsed upon the plaintiffs' conveyance:—

"THIS COURT doth declare that the registration in the Registry of Deeds Office, Dublin, on the 3rd day of January, 1903, of the judgment obtained by the defendants in this action in the action in the King's Bench Division, entitled—'1902. No. 12,653. Between William Grove White and Richard Blair White, carrying on business as White & White, plaintiffs, and Robert J. Heeney, defendant,' did not create any charge, and does not affect the lands of the plaintiffs, situate at Gaffney Little and Bellewstown, in the barony of

(1) 9 Ir. Ch. R. 497.

Upper Duleek and county of Meath, and was and is of no effect in so far as it creates a cloud on the title of the plaintiffs to the said lands. And this Court doth order that both parties do abide their respective costs of this action" (1).

Solicitor for the plaintiffs: *J. H. Callan.*
Solicitor for the defendants: *John Waldron.*

W. L.

IN RE DAVID IRELAND & CO. (2).

Companies Act, 1862, *sect.* 165—*Liability of Directors for costs of litigation occasioned by misfeasance not causing monetary loss.*

J., M., and I. were Directors of a Joint Stock Company which was being wound up voluntarily. In the course of the liquidation it appeared that cheques signed by J. and M. had been drawn against the Bank account of the Company for purposes in which I. alone was interested; but that, on the whole account, lodgments had been made by I. to the credit of the Company to an amount larger than the sums drawn out upon the cheques so signed by J. and M.

On a summons by the Liquidator, under sect. 165 of the Companies Act, 1862, to determine whether these sums had been expended *ultra vires*, and in breach of trust, and, if so, that the Directors should repay the said sums, it was found that no money loss had been sustained by the Company, but the Court decided that the Directors were guilty of gross neglect and breach of duty, and that such neglect and breach of duty were the cause of the litigation, and ordered that the Directors should pay the costs of the summons and inquiry:—

Held, that the Court had jurisdiction to make the order that the Directors should pay the costs, although the claim of the Liquidator for repayment of money had failed.

APPEAL by James Johnston and Thomas E. M'Connell, from so much of an order in this matter as directed that they should pay the costs of the proceedings.

David Ireland & Co. was incorporated on the 24th November, 1900, for the purpose of carrying on the business previously carried

(1) Cf. *Wild* v. *Watson* (1 L. R. Ir. 402) not cited.—[REP.]

(2) Before FITZGIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1904. *In re* IRELAND & Co.

on in Belfast by David Ireland, of carrier, carter, and undertaker, with a capital of £10,000. The directors were James Johnston, Thomas E. M'Connell, and David Ireland, of whom the last-named was managing director. The Company was a one-man Company, managed entirely by Ireland, and on the 3rd October, 1901, a resolution was passed to wind-up voluntarily. There were eighty-eight unsecured creditors, whose debts amounted in the aggregate to £1550.

David Ireland had taken a lease of premises at Donegall-road and Clonard River, Belfast, where he was engaged in building, but this was not connected with the business of David Ireland & Co. It appeared that Ireland had been in the habit of using the Bank account of the Company for the purpose of obtaining advances of money, which were expended on the Donegall-road property, and several cheques were drawn by Ireland on the Bank account of the Company, signed by Johnston and M'Connell, and M'Connell knew of the application of the money. Against this large sums were brought in and lodged to the credit of the Company's account from time to time by Ireland, which the directors said were sufficient to repay any advances made, so that there was no loss by these transactions.

S. B. Quin was appointed liquidator, and on the 23rd June, 1902, he applied to the Court by summons under sect. 165 of the Companies Act, 1862, for the determination of the following question arising in the course of the winding-up—Whether the sum of £1140 expended by the directors of the Company in building on and otherwise developing and improving certain lands at Donegall-road and Clonard River, Belfast, not the property of the Company, or connected with its business, was misapplied by the said T. E. M'Connell, James Johnston, and David Ireland, as directors of the Company, and was expended by them *ultra vires*, and in breach of trust, and if the Court should determine that the said money was so misapplied, that an order might be made ordering the directors to replace said sum with interest.

The case was adjourned into Court, and the parties were summoned for cross-examination on the affidavits made by them, and after such hearing by order dated the 13th November, 1902,

the Master of the Rolls referred the case to Chambers to take the following accounts:—

1. An account of all sums paid by James Johnston, T. E. M'Connell, and David Ireland, or any of them, and by which of them respectively, out of funds belonging to, or standing in the name of, David Ireland & Co., Limited, and applied towards liabilities of David Ireland in respect of the Donegall-road and Clonard River properties, not being the property of David Ireland & Co., Limited.

2. An account of all sums being debts due to David Ireland & Co., Limited, set off, and permitted to be set off, by the said James Johnston, T. E. M'Connell, and David Ireland, or any of them, or by which of them, respectively, against the liabilities of David Ireland in respect of the said Donegall-road and Clonard River properties.

3. An account of all sums of money from time to time after the incorporation of David Ireland & Co., brought into or paid in by or for the said David Ireland, and not being money properly constituting assets of the said Company, but being the proper moneys of the said David Ireland, although so brought in and mixed up with the funds of the said Company.

When the accounts so directed were brought in, the Chief Clerk found, with respect to No. 1, that there had been paid by Johnston, £281 18*s.* 9*d.*; by M'Connell, £246 15*s.* 2*d.*; and by Ireland, £716 16*s.* 7*d.* Both the said sums paid by Johnston and M'Connell were included in the sum paid by Ireland.

With respect to No. 2, the Chief Clerk found that there was £260 1*s.* 10*d.* set off by Ireland, and nothing by Johnston or M'Connell.

With respect to No. 3, the Chief Clerk found that £1135 0*s.* 3*d.* had been paid in by or for David Ireland.

Objections were filed by the liquidator to these accounts; and on the request of the liquidator, the decision of the matters in dispute was referred to the Judge. The request to the Judge dealt with two sums of £623 19*s.* 6*d.* and £182 3*s.* 10*d.*, part of the above sum of £1135 0*s.* 3*d.* The Master of the Rolls disallowed the appeal as to the entire of the sum of £623 19*s.* 6*d.*, except £15, and referred the £182 3*s.* 10*d.* back to Chambers.

Appeal. 1904. *In re* IRELAND & Co.

The latter inquiry was abandoned by the liquidator, as it would only have affected Ireland, as shown by the following figures :—

Total liability of Ireland on account 1, . .				£716	16	7		
Do. do. on account 2, . .				260	1	10		
							£976	18 5
Paid in by Ireland, as per ruling of Chief Clerk,				£1135	0	3		
Less disallowed by Judge, . .	£15	0	0					
Referred back to Chambers,	182	3	10					
				197	3	10		
							937	16 5
Leaving Ireland, in case the matters referred back to Chambers went entirely against him, liable for, . . .							£39	2 0

Total liability of M'Connell, .	£246	15	2
Total liability of Johnston, .	281	18	9
Sum paid in by Ireland, as above, opposite these sums,	£937	16	5

The order of the Master of the Rolls was dated the 21st April, 1904, and was as follows :—

> "AFFIRM the rulings of the Chief Clerk on the said account of David Ireland, except as to item No. 2 in section 1 thereof, amounting to the sum of £15, which the Judge doth disallow; and this Court doth order that the said James Johnston, D. Ireland, and T. E. M'Connell do pay to the said liquidator his costs of the orders of the 8th July and 13th November, 1902, respectively, and of the inquiry at Chambers, and of said adjournment, and this order thereon."

On the 14th July, 1904, Johnston and M'Connell asked for leave to appeal on the question of costs, when the Master of the Rolls made an order :—

> "THAT James Johnston and T. E. M'Connell be at liberty to appeal against said order as to costs on the question of the jurisdiction of the Court to make the said order as to costs, and that only. And it appearing to the Court that the ground of jurisdiction is the ground on which the application for leave to appeal is based, the Court being of opinion, and having decided on the hearing of the motion on which the said order of the 13th November, 1902, was made, that the directors were guilty of gross neglect through the proceedings of the Company, and in relation to its dealings with David Ireland and his accounts; and that such gross neglect and

breach of duty was the cause of the present liquidation, which, in consequence of it, was unavoidable; that the cost of it should be borne altogether by them, and not by the said Company or the liquidator."

Gordon, K.C., and *Hume, K.C.*, for the appellants:—

To make directors liable for misfeasance under sect. 165 of the Companies Act, 1862, the directors must have been guilty of misconduct by which the Company has suffered loss: *Re Canadian Land Company* (1). Here there was no loss, so far as Johnston and M'Connell were concerned, because the amount paid in by Ireland exceeded the amount for which Johnston and M'Connell were liable. The liquidator is in the same position as the Company; his claim cannot be placed higher than that of the Company.

The practice in Chancery invariably was that if the Court dismissed a bill, the plaintiff cannot get costs: *Tidwell* v. *Ariel* (2); *Sutton Harbour Company* v. *Hitchens* (3); and this was so, even if the suit was caused solely by the defendant's misconduct: *Cochrane* v. *O'Brien* (4). The Judicature Act has not increased the jurisdiction of the Court of Chancery to award costs, and it does not enable the High Court to impose upon a successful defendant the general costs of the proceedings: *Lambton* v. *Parkinson* (5). It is not within the discretion of the Court to make a defendant pay the costs of an action, if the plaintiff has no right to sue: *Dicks* v. *Yates* (6). As was pointed out in that case by James, L. J., there is a difference between the position of a plaintiff and a defendant. The authorities were all discussed in *Foster* v. *Great Western Railway Co.* (7), where it was held that the Railway Commissioners have no jurisdiction under the Regulation of Railways Act, 1873, to order a Railway Company, in whose favour they have decided, to pay the costs of an unsuccessful application. An order made as to costs, which is not really a matter of discretion, may be appealed from: *Witt* v. *Corcoran* (8).

(1) 14 Ch. D. 660.
(2) 3 Mad. 409.
(3) 15 Beav. 165.
(4) 8 Ir. Eq. R. 241.
(5) 35 W. R. 545.
(6) 18 Ch. D. 76, 84.
(7) 8 Q. B. D. 515.
(8) 2 Ch. D. 69.

Appeal. 1904. *In re* IRELAND & Co.

Matheson, K.C., and *R. C. K. Wilson*, for the liquidator :—

These proceedings were rendered necessary in consequence of the conduct of the directors. As soon as the liquidator came to examine the accounts, he found these payments made out of the assets of the Company, for purposes other than the business of the Company. That was a misfeasance on the part of the directors, who were in the position of trustees for the Company. It is within the discretion of the Court to order all costs reasonably incurred in ascertaining what the funds of the Company are to be paid by the parties whom the Court considers liable : *Butcher* v. *Pooler* (1).

Oct. 31

FITZ GIBBON, L.J. :—

As this case comes before us, it appears to raise a question of jurisdiction only; but so far as the jurisdiction depends on facts, we must be satisfied that there was sufficient evidence to sustain the finding of the Master of the Rolls.

The question of jurisdiction is—Whether, according to the settled practice of Equity, the Master of the Rolls was justified in ordering the appellants to pay the costs of litigation, incurred in an interlocutory proceeding? The company called "David Ireland & Co., Limited," was a "one-man Company," a form of business which the House of Lords has held not to be unlawful. It went into voluntary liquidation, which proceeded up to a point at which the Liquidator discovered that two of the Directors, other than David Ireland, had signed cheques on which money of the Company had been paid in discharge of personal liabilities of Ireland, which were not liabilities of the Company, because the property, on which the money was spent, was not the property of the Company, but of Ireland.

Under these circumstances the Liquidator came to the Court on a summons to investigate the matter. The terms of the summons are material. It asked (1), an inquiry as regards the fact of money having been paid as alleged; and (2), repayment by the appellants of any moneys ascertained to have been so paid. The appellants denied liability, on the ground that the payments were not made out of moneys of the Company, but out of Ireland's own

(1) 24 Ch. D. 273.

money, inasmuch as he had only "made a convenience" of the Company's bank account in making these payments, because he lodged money of his own to the credit of the Company's account, and that money was necessarily drawn out again upon cheques signed by the Directors.

The case went into Chambers, and we must take it that, on the inquiry, it appeared that substantial sums of money lodged to the Company's credit were drawn on cheques signed by the appellants for the personal liabilities of Ireland; but that he had, from time to time, lodged money of his own to an amount at least equal to the total amount so drawn, so that, ultimately, no money loss was incurred by the Company. As the result of the inquiry, it appeared that the appellants were entitled to credit for sums exceeding the amount with which they would otherwise have been chargeable for cheques wrongly drawn. There was no final certificate or order, because, when the parties came before the Master of the Rolls, it was seen that, in the ultimate result, the balance would be in favour of the Directors, at all events unless a further inquiry as to a sum of about £182, which was offered, were to result in a variation of the Chief Clerk's rulings. The Liquidator's counsel, after consideration, intimated that they would not go further, and so the proceeding ended.

The Master of the Rolls then ordered the Directors to pay all the costs of the proceedings in the Rolls Court, that is to say, the costs of the investigation of the Company's accounts relating to the drawing of the cheques in question by the Directors. The question on the appeal is—Whether, under the circumstances of the case, there was evidence of misconduct on the part of the Directors which would justify making them not only bear their own costs, but also indemnify the assets of the Company against the costs of investigating their dealings with the Company's money, having regard to the fact that the Company, in the result, lost no money through the transaction. In my opinion, if misconduct was proved, and if, but for that misconduct, the proceedings would not have been necessary, the *causa causans* of the proceedings was the misconduct of the Directors; and if the proceedings were *prima facie* proper, and even necessary for the liquidation, the fact that the misconduct did not result in ultimate loss does not oust the juris-

Appeal. 1904. *In re* Ireland & Co. Fitz Gibbon, L.J.

diction to make the parties who caused the litigation bear the costs of it. In Lewin on Trusts (ed. xi.), p. 1241, the rule is stated thus:—"If any particular instance of misconduct, or a general dereliction of duty in the trustee, or even his mere caprice or obstinacy, be the immediate cause why the suit was instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings, which his own improper behaviour occasioned; and, of course, if the trustee be decreed to pay the costs personally, he cannot afterwards deduct them from the trust fund in his hands."

What was the character of this interlocutory proceeding? We cannot put it more favourably for the appellants than by assuming that the rule as to costs in a winding-up matter under the Companies Acts is the same as in any ordinary suit in Equity. The summons commenced an action, which, of course, "sounded in damages": the object was to recover money; but how it happened that no money was recovered is material. The findings of the Chief Clerk and the dates on the accounts show that the Directors drew cheques on the Company's account for Ireland's debts, which were paid out of balances to credit which sometimes consisted entirely of the moneys of the Company, and not of any money which belonged to Ireland, or out of any money which, when the cheques were paid, had been provided by Ireland to meet them. If the Master of the Rolls had evidence to find that fact—and the evidence was ample—the principle on which I found my decision is not affected by the subsequent provision by Ireland of money sufficient to recoup the Company for what, at the time, was an illegal advance by the Directors of the Company's money to him. This was misconduct; there were many dates, while this practice went on, at which the Company was "out of pocket" by the Directors' misconduct; and if, at any of those dates, liquidation had supervened, there would have been actual loss. At best, the Directors wrongfully mixed the money of their *cestui que trusts* with the money of Ireland, and the proceeding taken was rendered necessary for the purpose of separating the Company's money from that with which the Directors had wrongfully intermixed it. In the case of land, a defendant has to bear the expense of restoring boundaries which

he has obliterated; and when a trustee mixes moneys which he was bound to keep separate, I hold that Equity has jurisdiction to make him pay the expenses incident to the legal proceedings required to set the matter right. The Master of the Rolls had sufficient evidence to show that these cheques were drawn without inquiring whether they were payable by the Company, and that, at least at the time of cashing them, there was no money of Ireland's in the Bank to meet them; and that they were in fact paid by the Company's money. It was a clear case of at least mixing up the moneys of Ireland and of the Company; and although it is unusual to make a party pay the costs of defending himself against a money claim which fails, I do not think that we should interfere where there was jurisdiction to make the order.

When this order was made, Mr. Gordon desired to appeal on the question of jurisdiction; and, on further consideration, the Master of the Rolls made the order of July 14, 1904, which must be treated as a statement of the facts on which we are to consider the question of jurisdiction, and on which, so far as it was a matter of discretion, he acted in awarding these costs. He did not give leave to appeal from the exercise of his discretion; but he had a right to put, and he did put, on the face of his order, a statement of his views of the facts, viz.:—[The Lord Justice read the order of July 14, 1904, *ante*, p. 136].

On the facts thus appearing, the Master of the Rolls had, in my opinion, jurisdiction to apply the rule in Equity that where a party in a fiduciary position has, by misconduct, made litigation necessary to carry out the trusts, "he must pay the costs," as stated by Lewin.

I desire to make one other remark. It has been said that this is "an extremely hard order." The hardship, if any, is the result of the "one-man Company" system. In my opinion anyone who chooses to give the support of his name as a Director to a Company of that class, and who neglects his duty by allowing the "one man" to do as he pleases, and actively assists him by paying away the Company's money at his will, deserves to bear the expense of investigating what has been done, and any practical judicial lesson against undertaking such directorships should not be lightly set aside by a Court of Appeal.

Appeal. 1904. *In re* IRELAND & Co.

WALKER, L.J. :—

I agree. It is settled by decisions to which our attention has been directed that where a plaintiff sues a defendant without any title to sue him, and the Court dismisses the action because of the failure of title of the plaintiff, there is no jurisdiction to make the successful defendant pay the whole costs of the litigation, though the Court may make the defendant pay the costs of issues on which he has failed, or costs in respect of misconduct by him in the course of the action. It has also been pointed out by James, L.J., in *Dicks* v. *Yates* (1), that the position of a defendant in this respect is more favourable than that of a plaintiff, because the defendant has been dragged into Court.

The real question before us is whether a trustee, whose conduct is investigated by the Court, at the instance of his *cestui que trusts*, who always have a title to make such an investigation, may not, in the discretion of the Court, be ordered to pay all the costs of an inquiry which breaches of trust on his part have made necessary, even though it appears that no pecuniary loss has been suffered in result by reason of the breach.

The Master of the Rolls has found that the gross neglect and breach of duty of Messrs. Johnston and M'Connell were the causes which brought about and rendered necessary the inquiry under the 165th section of the Act of 1862 into their conduct as directors of the Company, and who filled, in respect of the matters investigated, the position of trustees for the Company ; and so holding, he has considered that he had a discretion to make them indemnify their *cestui que trusts* from the costs so occasioned. If he had such a discretion, we have no right to inquire as to the mode of exercising it.

Coventry and Dixon's Case (2) has established that the 165th section only gives a summary remedy to enforce rights which must otherwise have been enforced by the ordinary procedure of the Court. In that case it was decided that the directors had not been guilty of any misfeasance or breach of trust, and no question of costs arose. In the present case it appears that the trustees were parties, by means of the cheques which they signed, to an

(1) 18 Ch. D. 85. (2) 14 Ch. D. 660.

application of the moneys of the Company to a wrong and unlawful purpose for the benefit of their co-trustee Ireland. The books of the Company *prima facie* sustained the allegations made. But it appears Ireland, whose private moneys were mixed up with those of the Company, put the Company ultimately, in result, in funds sufficient to meet the deficit which had arisen from the acts of the appellants. What showed that? An inquiry which displaced the *prima facie* case arising from the trustees' action.

We are bound to hold that there was not only reason but necessity arising from such action to inquire by means of the 165th section into the conduct of those trustees; and why should not the Court have jurisdiction to say, as you were guilty of a breach of trust, and thereby led to all this litigation, you must indemnify your *cestui que trusts* from the costs and loss you occasioned to them?

The case is not the same as *Dicks* v. *Yates* (1). It is an application of the principles by which the rights of trustees and *cestui que trusts* are guided.

I do not think we can surrender a jurisdiction over the trustee which the Master of the Rolls has (we must assume) rightly, as a matter of discretion, exercised.

Holmes, L.J.:—

The two appellants are James Johnston and Thomas M'Connell, who, with David Ireland, were the directors of David Ireland & Co., Limited, a small Joint Stock Company, formed to take over business previously carried on by Ireland, and at present being wound-up voluntarily.

Mr. Quinn, the liquidator, applied to the Master of the Rolls, pursuant to section 165 of the Companies Act, 1862, to decide whether the sum of £1140 19*s.* 3*d.*, expended by the directors in building on, and otherwise improving, certain lands at Donegall-road and Clonard River, in the city of Belfast, not being the property, or connected with the authorised business, of the Company, was expended by the directors *ultra vires*, and in breach of trust; and in the event of this question being determined

(1) 18 Ch. D. 85.

Appeal. 1904. *In re* IRELAND & Co. Holmes, L.J.

in the affirmative, the Court was asked to order repayment of the amount thus misapplied.

I entirely agree with the view of section 165 taken by James, L.J., in *Coventry and Dixon's Case* (1). It merely provides a summary mode of enforcing rights which might have been enforced by the ordinary procedure of the Courts; and I am of opinion that the jurisdiction as to costs is the same, whether the liquidator seeks the relief asked for under this section, or by action commenced by writ of summons. I have no means of knowing what happened on the hearing of the liquidator's application, save in so far as I can draw an inference from the order made thereon. I gather from it that the defence of the directors was that, while they may have applied moneys that belonged, or apparently belonged, to the Company to purposes with which the Company had no connexion, these moneys, although standing in the name of the Company, were either the private property of David Ireland or were afterwards repaid by him.

Accordingly, the Master of the Rolls directed an account of all sums applied by the directors, or any of them, out of the funds belonging to, or standing in the name of, the Company towards the private liabilities of David Ireland, and an account of all sums from time to time, after the incorporation of the Company, brought into or paid for the Company by David Ireland out of his own private funds.

The result of these accounts, as taken by the Chief Clerk, was to show that while the two appellants had applied funds belonging to the Company or standing in its name to the discharge of the private liabilities of Ireland, he had paid into or for the Company a much larger amount of his own moneys. There seems, in fact, to have been an entanglement of the business of the Company with the private affairs of Ireland, which it was not easy to unravel, but which, according to the figures of the Chief Clerk, had not ultimately involved the Company in loss. The liquidator, being dissatisfied with this result, had the case adjourned from Chambers into Court, where it was fully investigated by the Judge himself, who affirmed the rulings of the Chief Clerk, except as to an item

(1) 14 Ch. D. 660.

of £15. All parties regarded this as the end of the case, and the Master of the Rolls having been asked to dispose of it finally, ordered the directors to pay all the costs incurred by the liquidator from the inception of the proceedings. The question is whether he had jurisdiction to visit the appellants with these costs.

I assume, and I think I rightly assume, that the liquidator has substantially failed in the litigation. His object was not to have an adjudication as to whether the directors had been guilty of a technical breach of duty, it was to show that they had misapplied funds of the Company, which they were bound to repay. It was found on the taking of the accounts that the assets of the Company were not diminished by the acts or neglect of the appellants, and that therefore they were under no liability to the Company when the proceedings were begun. To order them in these circumstances to pay the costs of their adversary was a step so strong and so unusual that I cannot conceive a Judge making such an order without some cogent reason.

Fortunately, we are not left to speculate as to what the reason was. The Master of the Rolls has told us that the ground on which, in the exercise of his discretion, he awarded costs to the liquidator was that the directors had been guilty of gross neglect throughout the proceedings of the Company, and in relation to its dealings with David Ireland and his accounts, and that such gross neglect and breach of duty were the cause of the litigation which, in consequence thereof, became unavoidable.

I have no reason to doubt, and in any case I am bound to assume, that the directors, by the neglect of the duty they owed the Company, allowed its business and accounts to be so mixed up with the affairs of David Ireland as to have misled the liquidator, and to have made it necessary, in the interests of the Company, to obtain a judicial decision on the questions raised by him in his application under section 165.

Had the Judge in this state of things jurisdiction to order the directors to pay the liquidator's costs, although he failed in the object of the litigation? This is the narrow point arising in this appeal, and I am desirous to confine myself to it.

Appeal. 1904. *In re* IRELAND & Co. Holmes, L.J.

I agree with the law laid down in *Dicks* v. *Yates* (1), and the other cases that have been referred to. The general rule is that where a plaintiff is shown to have no right or title to sue the defendant, there is no jurisdiction to order the defendant to pay all the costs of the action. He may be obliged to pay the costs of issues on which he fails, or costs caused by his misconduct in the progress of the case, but not all the costs of suit. This rule would probably apply where the plaintiff had been led to bring the action through some act or omission of the defendant not amounting to a breach of trust, or breach of duty. But where the defendant stands in a fiduciary relationship to the plaintiff, and the action is made necessary by breach of some duty arising from his position, I am of opinion that he may be ordered to pay the costs, even where he succeeds in showing that his misconduct has caused the plaintiff no pecuniary loss. When a trustee has dealt with trust funds, or a director has managed the affairs of a Company in such a way as makes the ascertainment of the property subject to the trusts, or of the assets of the Company, impossible without an action, there is a right to sue, quite irrespective of whether the misconduct has caused pecuniary loss; and the jurisdiction to make the defaulter pay costs does not depend thereon. This, I think, is well settled law, and although judges are rightly reluctant to visit with costs breaches of trust which do not affect the value of the trust property, or where the deficiency caused thereby is afterwards made good, the jurisdiction to do so exists in cases like the present; and as this is the only matter for our consideration, the appeal must be dismissed.

Solicitors for the appellants: *Carson and M'Dowell.*
Solicitors for the liquidator: *Wheeler and M'Cutcheon.*

R. D. M.

(1) 18 Ch. D. 85.

REID *v.* CARLETON.

(1902. No. 274.)

Barton, J.
1904.
Nov. 23, 26.
Dec. 2, 12.

Will—Absolute gift—Property or power—Life estate to wife—After her death executors to sell portion for payment of legacies—Balance to be disposed of according to wishes of wife.

A testator devised and bequeathed to his wife during her life all his cash, lands, &c., and directed that she was to receive all interest and profits out of his said property, to be paid to her during her life by his executors. After the death of his wife the executors were to sell portion of the property to pay certain pecuniary legacies. Any balance of the property remaining after the said bequests to be disposed of according to the wishes of his wife:—

Held, that the wife took the property absolutely, subject to the legacies payable after her death.

FURTHER CONSIDERATION.

The action was for the administration of the real and personal estate of Thomas Carleton, deceased.

Thomas Carleton made his will, dated the 6th March, 1900, and, so far as material, as follows:—"I leave, devise, and bequeath to my wife, Sarah Carleton, during her natural life, all cash, lands, houses, debts due me, promissory notes, chattels, and goods of whatsoever kind I may die possessed of; and said wife, Sarah Carleton, is to receive all interest and profits that may be made and accruing to her out of the above-mentioned property, to be paid to her during her natural lifetime by my two mentioned executors, under the following condition, viz. after the death of my said wife the two mentioned executors are to sell such a portion of the above-mentioned property, if cash be not in hands, to pay to the following mentioned friends, viz. Thomas William Parker the sum of £100 sterling, and to pay to Sarah Carleton Parker the sum of £100 sterling, and to pay . . . [other pecuniary legacies]. I also leave to my two executors, William John Hamilton and Reverend William Reid, who are to act in connexion with my said wife, Sarah Carleton, the sum of £30 sterling

Barton, J. 1904. REID v. CARLETON.

each. I also bequeath to my brother, John Carleton, the sum of £50 sterling, and . . . [other pecuniary legacies]. Any balance of my property and assets remaining after the aforesaid bequeathments are paid to be disposed of according to the wishes of my wife, Sarah Carleton."

The testator died on the 4th August, 1901, and probate of his will was granted to the plaintiffs, the said William John Hamilton and Rev. William Reid.

The testator's widow, Sarah Carleton, died on the 21st September, 1901, intestate and without having made any disposition or appointment of the balance of the property.

The plaintiffs, not having sufficient cash to pay the legacies, proceeded to sell portion of the real estate; but the defendant, John Carleton, the testator's heir-at-law, claimed the same, subject to the payment of the sum necessary for the legacies, and objected to the sale, which was, accordingly, not completed.

The principal question now was, whether the testator's property, subject to the pecuniary legacies, had passed under his will to his widow absolutely, or whether it had, on her death, and in the absence of any disposition or appointment by her, devolved as undisposed-of estate of the testator.

Matheson, K.C., and *Bartley*, for the plaintiffs :—

The first question is, whether the widow took the property absolutely. If the Court holds she did not, and that John Carleton's contention is correct in this respect, then the executors will contend that there was a conversion, and that they, and not the testator's heir, are entitled to the realty.

Gordon, K.C. (with him *Steen*), for Florence Parker, the heiress-at-law of the testator's widow :—

The testator's plain intention was to give all his property to his wife, subject to the legacies which were to be payable at her death. He limited the gift to her in the first instance to a life estate for the purpose of introducing the legacies payable on her death. "To be disposed of according to the wishes of my wife" means that she was to do what she liked with the property, and the

words gave her an absolute estate and interest in it—not a mere power of appointment over it: *Goodtitle* dem. *Pearson* v. *Otway* (1); *Hoy* v. *Master* (2); *Nowlan* v. *Walsh* (3); *In re Maxwell's Will* (4). Farwell, Powers (2nd ed.), 63.

Wylie, K.C., and *Glover*, for John Carleton:—

If the testator's intention had been such as that contended for, he could have carried it out more simply by leaving all his property to his wife, subject to the legacies payable at her death. Instead of that a life interest is given to her by express words of gift. On her death *the executors* are to sell so much as is necessary to provide for the legacies, and the balance is to be disposed of according to the wishes of the wife. If the testator had said "according as my wife shall direct," that would clearly have meant power, not property, and the words used have the same meaning. "To be disposed of" means to be disposed of by the executors. The duty was cast on them of paying the profits to the wife during her life, and after her death of selling so much of the property as should be required to pay the legacies. The executors therefore took the legal estate: *Davies to Jones and Evans* (5); the disposition of the balance must have been a disposition by them; and it was to be according to the wishes—necessarily expressed wishes—of the wife—that is, as she should direct them. The express life estate must be presumed to have been given for the purpose of limiting the interest which the wife was to take—there was no other reason for so confining the gift—and it cannot be enlarged by implication. The final clause, therefore, must be construed as giving a power of appointment only. *Anonymous* (6); *Archibald* v. *Wright* (7); *Reith* v. *Seymour* (8); *Espinasse* v. *Luffingham* (9).

In the cases relied on by the other side, life interests were given for the purpose of letting in interests in remainder: see Sugden, Powers (8th ed.), pp. 106–108. See also *Pennock* v. *Pennock* (10),

(1) 2 Wils. 6.
(2) 6 Sim. 568.
(3) 4 De G. & Sm. 584.
(4) 24 Beav. 246.
(5) 24 Ch. D. 190.
(6) 3 Leon, 71.
(7) 9 Sim. 161.
(8) 4 Russ. 263.
(9) 3 J. & L. 186.
(10) L. R. 13 Eq. 144.

Barton, J. 1904.

REID v. CARLETON.

In re Thomson's Estate (1); *Nannock* v. *Horton* (2). In *In re Maxwell's Will* (3), the moiety was to be disposed of as the son should "think proper"—not direct—that is, the disposition was to be by the son, and the provisions with respect to the other moiety showed that the testator was giving property, not conferring power. In *Goodtitle* dem. *Pearson* v. *Otway* (4), the devisee was heir-at-law, she had the fee in any case, and it was not necessary to decide the question of construction. Moreover, there the power of disposal was given to the devisee; here the executors are the only persons who could have the disposal of the property. In *Hoy* v. *Master* (5) one-third of the property was given to the daughter, and the testator must have intended a similar gift of the two-thirds to his wife, and this intention was made clearer still by the codicil. In *Nowlan* v. *Walsh* (6) the will consisted of gifts of property direct to the beneficiaries—the executors were not given any powers. In that case the general principle is recognized that where a life estate is given, the presumption arises that this is done for the purpose of limiting the extent of the estate, but the qualification is applied that if the will shows that such an estate is given for some other purpose, the inference cannot be drawn. In *Nannock* v. *Horton* (2) the principle of the cases is stated—that where there is a limited interest, and a power, though the latter, without a limited interest pointed out might have amounted to an absolute gift, yet, where both concur, the gift is held to be of the limited interest; and the other to be but a power, and not an interest. In *In re Maxwell's Will* (3), and other similar cases, there was a plain reason apparent on the will itself for confining the gift in the first instance to a life estate, as the property was afterwards contingently given away to other persons. See the rule stated in Farwell, Powers (2nd ed.), 63, where *In re Maxwell's Will* (3) is cited as the first example of it. Here there is no reason for specifying a life interest except to define the extent of the estate given. *In re Maxwell's Will* (3) was pressed on the Vice-Chancellor in *Pennock* v. *Pennock* (7), but he distinguished it on the ground

(1) 13 Ch. D. 144; 14 Ch. D. 263.
(2) 7 Ves. 391.
(3) 24 Beav. 246.
(4) 2 Wils. 6.
(5) 6 Sim. 568.
(6) 4 De G. & Sm. 584.
(7) L. R. 13 Eq. 144.

that there the words *prima facie* imported a gift of the absolute interest. In *In re Thomson's Estate* (1), where there was a gift over, it was held that the widow took a life interest with a power exercisable during her life; and in *Perry* v. *Merritt* (2), also the case of a gift over, the first gift was absolute, requiring clear words to cut it down. The present case is ruled by *Reith* v. *Seymour* (3), recognized in *Pennock* v. *Pennock* (4). The case in Leonard (*Anonymous* (5)) has not been overruled; see Sugden, Powers (8th ed.), pp. 107, 108; the later cases recognize its authority. Clear words are needed to deprive the heir.

Steen, in reply:—

There is not sufficient on this will to give the legal estate to the executors by implication. They are directed to sell only such portion of the property as should be necessary to pay the legacies; they are not mentioned in connexion with the disposal of the balance, and they took no greater power or estate than was required for the purpose specified. Even if they took a legal estate, the beneficial and equitable estate vested in the widow, and the use was executed in her. When the testator intended the executors to sell, he said so. To supply the words "by my executors" in connexion with the balance is to beg the question—if the words of the will give the estate, there is no necessity to supplement them. The testator would have hesitated to give his property—as suggested he might have done—directly to his wife subject to legacies payable at her death, lest at that time nothing would remain out of which they could be paid. In *Reith* v. *Seymour* (3) there was an express life estate, and no intervening interest, and it was clear that a limited estate with a power of appointment was intended. So in *Archibald* v. *Wright* (6), where there was also a restraint on alienation during the legatee's life, which, it was held, showed an intention to give a power exercisable by will only. The testator here provided for all his relatives, including his heir-at-law, by money legacies, and the clause in question is a

(1) 13 Ch. D. 144; 14 Ch. D. 263.
(2) L. R. 18 Eq. 152.
(3) 4 Russ. 263.
(4) L. R. 13 Eq. 144.
(5) 3 Leon. 71.
(6) 9 Sim. 161.

Barton, J. 1904. REID v. CARLETON.

residuary gift to his wife. This case is undistinguishable from *In re Maxwell's Will* (1), and *Nowlan* v. *Walsh* (2); see also *Robinson* v. *Dusgate* (3). The *Anonymous Case* (4) was declared in *Goodtitle* dem. *Pearson* v. *Otway* (5) not to be law.

Dec. 12.

BARTON, J.:—

The words to be construed are as follows:—"Any balance of my property and assets remaining after the aforesaid bequeathments are paid to be disposed of according to the wishes of my wife, Sarah Carleton." The principal contention on behalf of the heir-at-law has been that the testator intended by these words to give to his wife a power of appointment superadded to the previous gift to her of a life estate, and reliance was placed upon *Reith* v. *Seymour* (6) and *Archibald* v. *Wright* (7). But those cases seem to me to be distinguishable. In *Reith* v. *Seymour* (6) the words were "at her entire disposal either by will or otherwise," which pointed to a power by indicating the mode of its exercise. In *Archibald* v. *Wright* (7) there was a direction not to alienate, from which it might be inferred that the intention was to give a limited power to appoint by will. On the other hand, on behalf of the widow, counsel cited *Nowlan* v. *Walsh* (2), and *In re Maxwell's Will* (1), in which, upon the construction of similar words, gifts to donees of previous life interests in the same property were held to import absolute interests, and not to create mere superadded powers.

None of the authorities really gives us much direct assistance. The question really resolves itself into a search for the intention of the testator in the language of this particular will, which is a document of an untechnical character. I have come to the conclusion, after giving the matter the best consideration I can, that the testator intended to give his property absolutely to his wife, subject to the payment at her death of a large number of legacies. The gift of a life estate to the wife in the first instance

(1) 24 Beav. 246.
(2) 4 De G. & Sm. 584.
(3) 2 Vern. 181.
(4) 3 Leon. 71.
(5) 2 Wils. 6.
(6) 4 Russ. 263.
(7) 9 Sim. 161.

was a means towards the end which he had in view. He appears to have considered that the best way of working out his intention was to give a life interest to the wife, so as to ensure that the property should be kept together during her life and be available at her death for the payment by his executors of these numerous legacies. After carrying out this purpose a residue would remain, and as regards that residue he had nobody in his mind except his wife. This is, I think, one of those wills in which, as Knight-Bruce, V.-C., said in *Nowlan* v. *Walsh* (1), an intention to give a life interest "may rationally be supposed to coexist" with an intention to afterwards give an absolute interest in the residue.

The words of this residuary bequest seem *primâ facie* to import property rather than power. Sir J. Romilly, in *In re Maxwell's Will* (2), said of the words "to be disposed of as my son shall think proper" that it could not be reasonably argued that they were anything else than an absolute gift of the property to the son. There is in this will no reference to any objects or mode of exercise, or other characteristic of a power. There is no gift over in default of appointment. The only objects of testator's bounty were his wife and the legatees, and his wife seems to have been present to his mind throughout the whole will, being the first and last and, after the legatees, the only beneficial object of its provisions. The language of the residuary clause itself, and the general scope of the will, have led me to the conclusion that the testator, having introduced the life estate for the purpose of preserving a fund for payment of legacies at his wife's death, and having come to the end of this long list of legatees, had no other intention than to leave the residue absolutely to his wife.

Another view of the residuary clause was suggested in the course of the argument—namely, that the testator may have intended that the executors should hold the residue upon trust to apply it in accordance with the wishes of his wife, which wishes were to be expressed by her to the executors orally or otherwise during her lifetime. But the testator did not say

(1) 4 De G. & Sm. 584, 586.
(2) 24 Beav. 246, 250.

Barton, J. 1904. REID v. CARLETON.

all this; and this construction would seem to involve the introduction into the will of words that are not there, and of an intention which can hardly be found in the language used by the testator according to its ordinary meaning. I understood counsel for the heir-at-law in opening the case to present it as one in which the choice lies between an absolute gift or a power superadded to a life estate, and I hold that the gift was absolute.

Solicitor for the plaintiffs: *M'Lernon.*
Solicitor for Florence Parker: *Reid.*
Solicitors for John Carleton: *Glover & M'Guckin.*

D. M'C. M.

Barton, J. 1904. July 1, 2, 4, 27. *Appeal.* Dec. 6, 7.

DONNELLY *v.* ADAMS.

(1902. No. 803.)

Easement—Way necessary for convenient user of tenement—No defined path—Door—Lease—Implied grant—Derogation.

The defendant, an owner of building ground on which he had erected houses, demised one of them, with the garden thereto attached, to the predecessor of the plaintiff. In the rere wall of the garden was a door opening on the defendant's ground. This ground was to a large extent waste, being used in part for storing building materials, and in part for growing vegetables. It was surrounded by a wall, in which were two gates opening on public passages. These gates were kept locked, the keys being in the possession of the defendant. There was no defined path from the door to either gate. At the time of the demise the defendant gave the lessee a key of the back door, to enable him to bring in coals. The lessee wanted to get a right of way, but the defendant told him he could not give a right of way, but he would allow him to bring in coals by the back door. The lessee had since brought his coals through the door, the gates being opened by the defendant for the purpose on each occasion. There was no other way by which coals could be brought to the house except by the hall door. The place in which coals were stored was at the back of the house, approached by a path laid in concrete leading through the garden from the back door:—

Held, on appeal (reversing the decision of Barton, J.), that, having regard to the evidence as to the conversation between the parties thereto at the date of the

letting, and the giving of the key by the defendant to the lessee, and also the condition, user, and circumstances of the demised premises, the lease was made by the defendant to the lessee upon the terms that during its continuance the occupiers of the house thereby demised should have the right to use the door opening from the demised premises into the defendant's land, for the purpose of bringing in coal for the use of the inhabitants of the house, with the further right of passing and repassing, for the purpose aforesaid, across the defendant's land between the door and one of the adjoining public highways, by such route and through such gate leading to either of such highways as the defendant might from time to time point out.

ACTION for damages for the obstruction of the plaintiff's right of way from the rere of his premises, No. 19, Harcourt-terrace, across the defendant's land, for a declaration that he was entitled to such right of way, and for an injunction to restrain the defendant from interfering with him in the exercise of it.

The amended statement of claim alleged, amongst other matters:—By indenture of lease, dated the 19th February, 1886, J. S. Joly demised to the defendant, Stephen Adams, a parcel of ground in the City of Dublin, for 900 years at a yearly rent; the defendant built on the plot the house and offices after mentioned: by indenture of sub-lease, dated the 16th August, 1888, the defendant and his mortgagees, in consideration of a fine of £630 paid to him, demised to Joseph Patrick Donnelly that piece or plot of ground, being part of the farm or lands of Saint Sepulchre's fronting Harcourt-terrace, bounded on the north by Mr. Pickering's house and premises, on the south by a house and premises then in course of erection by the said Stephen Adams, on the east by ground in the possession of the said Stephen Adams, and on the west by Harcourt-terrace, as more particularly described on the map annexed to the said lease, together with the house, out-offices, and premises thereon erected and built, to hold the same, with the rights, members, and appurtenances thereunto belonging or in anywise appertaining unto the said Joseph Patrick Donnelly, for 897 years at the yearly rent of £10. Prior to the execution of the sub-lease the rere wall of the said premises divided the same from a field at the rere thereof, which field was portion of the premises demised by the lease of 1886, and there was a door in the said rere wall leading from the premises in the sub-lease to the said field, and there were two well-defined passages or ways leading

Barton, J. 1904. DONNELLY v. ADAMS.

from the said back door across the field—one to Adelaide-road, a public highway, and the other to a gateway leading to a public way on the Grand Canal premises. Prior to the sub-lease a substantial house, two storeys high, with out-offices, suitable for a gentleman's city residence, and known as 19, Harcourt-terrace, had been built by the defendant on the premises thereby demised, and the said ways or passages were great conveniences and a valuable right in connection with and necessary for the reasonable enjoyment of the said house: the defendant also erected the said rere wall, and when erecting same placed the door therein, and the said door led to no other place than those before mentioned. Joseph Patrick Donnelly died in 1900; the plaintiff, James Donnelly, was assignee of his personal representative. Recently the defendant informed James Donnelly that he would close up the door—that Donnelly had no right of way there, and the defendant thereupon dug a trench in the said field alongside and parallel to the door, and built a wall close to the door, which trench and wall completely blocked up the door, and prevented the plaintiff making any use of the doorways or passages.

Pending action James Donnelly assigned his interest to Mary Josephine Donnelly, by whom the proceedings were continued.

The sub-lease of the 16th August, 1888, contained a covenant by the lessee to use the demised premises only as a private residence: all the other houses on the road where the demised house was situated were private residences.

There was no "coal stopper" or other means for getting in coals in the front of the house, except by the hall door; and the coal-hole was at the back of the house on the ground-floor between the kitchen and the outer door, which was connected by a concrete footpath through the garden with the back door in the garden wall which opened into the defendant's land.

The further facts and the result of the evidence are stated in the judgment of Barton, J., and it is necessary to set out only the following portions of the oral examination of the witnesses.

James Donnelly's evidence:—

Question.—Outside the door, what is the character of defendant's land?

Answer.—There is some grass growing, and a lot of old planks and rubbish, and other things that builders generally use.

Q. Is there any sort of a path or track on this ground?

A. The last time I was there there was a small path, but it is over twelve months ago.

Q. What was the width of that path?

A. About eighteen inches—a small path like what would be made by a person walking. It was from the back of these houses down to the gate.

W. H. Beardwood (architect) :—

Q. At the back of the houses is there a path?

A. Yes, about four inches wide.

Q. Does it go back to the door behind No. 19?

A. No, for the door has not been used, and it is undefined there, as grass has grown on it.

Lewis Fleming :—

Q. At the back door was there not a stone step?

A. Yes, a granite sill in the doorway, and then a stone step under that on to the cartway.

Q. What kind was the passage?

A. Like a beaten cart-track over ground not prepared, and where the wheels would sink in was filled in with rubble—it was a sort of amateur metalling.

Frederick Hayes (surveyor) :—

Q. There is a beaten track there?

A. Yes.

Q. And cart-tracks?

A. Yes, the beaten track is from defendant's house, and is about eighteen inches wide.

Q. Are there marks of cart-wheels there?

A. I did not notice any.

Q. There is nothing at the back of No. 19 except a little footpath?

A. No.

Q. Is it not a prepared path?

A. No, it is ordinary clay.

Barton, J. 1904. DONNELLY *v.* ADAMS.

The defendant :—

Q. You use the back door of your own house?

A. Yes, I go from my house to my office, and back that way; and my man has been putting ashes on the track all the winter for my convenience to make it as dry as possible.

Q. Are there any cart tracks?

A. Yes, from the gateway to the angle of the vegetable green. There is a heap of stones there, and getting them in and out made these cart tracks. There is a rough cartway up the back where the coal carts used to come up to the corner at the sides of the houses, and the men used to carry the coal from that on their backs.

Q. When No. 19 was built, was there any track at the back?

A. No, not the smallest definition of a track.

Q. Any track that is there now has been made either by your carts carrying stones, or the coal carts?

A. Yes, and I brought in the coal to my own house that way?

Q. When you gave the key to Donnelly, was he to be able to go in and out?

A. No, it was to get his coals in only.

Q. At the time Donnelly took the lease had you a conversation with him about the back door? (Question objected to.)

A. Yes, he wanted to get a right of way, and I told him I could not give him a right of way under the circumstances, but I would allow him to get in his coals when he wanted.

D. F. Browne, K.C., and *Garrett W. Walker*, for the plaintiff.

Matheson, K.C., and *T. Henry Maxwell*, for the defendant.

The arguments were similar to those in the Court of Appeal, *infra*.

July 27. BARTON, J.:—

Plaintiff complains of the obstruction of two alleged rights of way by the erection of a wall opposite to, and practically against, the back door of her premises, 19, Harcourt-terrace. Plaintiff holds the house from defendant under a lease made to

her late father for 987 years, and dated August 6th, 1888. The house stands upon a building plot situate between Adelaide-road and the canal. This building plot is held by defendant under a superior lease for 900 years, dated February 19, 1886. The lease of 1888 of the house involved its severance from adjoining lands at the rere which were retained by defendant in his own possession. Plaintiff claims that these two ways, to and from her back door over defendant's adjoining lands, were in the nature of continuous and apparent quasi-easements intended for the convenient enjoyment of the demised premises, and that as such they passed by implication with the lease.

The main question argued before me was whether an implied right of way could or ought to be inferred, having regard to the fact that at the date of the lease to plaintiff's predecessor in title there was upon the alleged servient tenement no marked or defined way or track used with, or apparently intended to be used with, the back door. This fact is not disputed. The track referred to by plaintiff's witnesses, Donnelly, Beardwood, Fleming, and Hayes, is a track of recent date, caused by user subsequent to the lease of 1888. But, before I approach the main question, I must refer briefly to several matters, which have been the subject of discussion, for the purpose of disposing of them—namely (*a*) the abandonment by plaintiff of any cause of action for trespass, (*b*) the form of the claim, which is not merely for one way, but for two rights of way in different directions, (*c*) the circumstance that the ways cannot be claimed as "ways of necessity," (*d*) the incident of the giving of a key of the back door by the defendant to the lessee, and (*e*) the circumstances under which defendant built the obstructing wall.

It is to be noted at the outset that at the trial plaintiff's counsel abandoned any claim for trespass to the back wall or door. It was proved and not disputed that the obstructing wall has been built upon defendant's lands outside the demised premises. Defendant came to trial prepared to meet any technical claim with further expert evidence as to boundaries, measurements, and ownership of the back wall and door. In consequence of the abandonment of any claim for trespass, this evidence was dispensed with. The sole question which has been discussed has been

Barton, J. 1904.

DONNELLY v. ADAMS.

whether there was an implied grant of the rights of way. If there was an implied grant of a right of way, the obstruction was a breach of, and derogation from, the grant. If there was no implied grant, the mere withdrawal of a permission to use the ways or the mere obstruction of the opportunity of using them would not be a derogation, even though it might result in inconvenience or injury to plaintiff. I think it necessary at the outset to make it clear that no claim for trespass or other technical cause of action has been put forward. The case has been presented to the Court as a right of way case, and a right of way case only.

The plaintiff claims not merely *one* way but *two* rights of way to both of the easternmost corners of this building plot. The evidence, however, only refers to one way—namely, to a gate opening to the road bordering the canal. The explanation of the claim to two, instead of one is, I think, traceable to a provision in the head lease under which defendant holds the building plot. By that provision defendant stipulated with the head landlord for access for himself and his under-tenants at both corners at the eastern end of the plot to passages or strips of land which were the head landlord's property. This was essential for the scheme of building then contemplated by the parties to the head lease. It appears from the plans referred to in the head lease, and lodged with the Dublin Corporation, that it was at that time contemplated by the head landlord and by defendant that a terrace should be built with reres extending to the back of the building plot and a back lane connecting with two points of access at Adelaide-road and the canal respectively. These plans—whether by waiver, release, or otherwise—were departed from before plaintiff's house was built. Plaintiff's house was built with a rere far short of the eastern boundary of the building plot and with no back lane and no connexion with the two points of access to the building plot which were mentioned in the head lease. The fact that the head lease is referred to in plaintiff's lease does not seem to me to advance her case. If she has these rights of way over defendant's lands, the provision in the head lease would enable access to be given to her over the head landlord's property. But so far as the present action is concerned, the head lease does not seem to me to aid, although it may serve to explain, her claim for a double right

of way. The evidence relates only to one of these ways, namely, the way to the canal gate.

In this connexion I find it necessary to point out that plaintiff cannot, and does not, claim these ways as "ways of necessity." In some of the arguments addressed to the Court this point seemed to me to be overlooked. For example—plaintiff's counsel, more than once, declared that plaintiff is willing to take a way in any direction, or to any terminus, so long as she gets access from the back door to the public road. In other words, they say that if they fail to establish a right to a way in any definite direction, they are willing to leave the selection of the route of the way to the defendant. That would appear to be a very reasonable attitude if this way could be claimed as a "way of necessity." But it is admitted that it cannot be claimed as a way of necessity. It is a highly convenient way, but the back garden can be approached, and for the last two years has always been approached, from the front door, although that mode of access is accompanied by inconvenience. Some passages were cited from judgments of authority which serve to indicate how easements of convenience may approach sometimes very near to easements of necessity, being in fact in a sense easements of "qualified necessity." But the distinction in principle between "ways of necessity" and ways of "convenience" is, for certain purposes, well marked and well settled, and in a case like the present deserves to be carefully borne in mind.

The next matter to which I ought to refer is the incident of the giving by the defendant to the lessee of a key of the back door. Defendant admitted in cross-examination that at or about the time of the demise he handed to the lessee, Mr. Donnelly, a key of the back door, so that he might get his coals in through that door. On re-examination, arising out of this evidence upon cross-examination, the defendant said that Mr. Donnelly, the lessee, wanted to get a right of way, and that he told him he could not give him a right of way under the circumstances, but that he would allow him to bring in coals that way when he wanted. Evidence of this conversation was objected to by plaintiff's counsel; but I think it was admissible on re-examination as a conversation accompanying and explaining the handing of the key to the lessee;

Barton, J. 1904. DONNELLY v. ADAMS.

and also for the purpose of rebutting the suggestion that the giving of the key, or the user of the key, afforded evidence of a representation or contract in respect of the alleged right of way. I see no reason to doubt that the conversation took place. It would certainly seem highly improbable that the key should be given on any other condition. A right of way across defendant's lands to both or even to one of these corner gates would practically have rendered the rest of this building plot useless for building, or for any other purpose inconsistent with such a right.

Perhaps I ought also to refer to a letter, which was put in evidence, written by defendant to a third party, which contained a passage to the effect that he must give access to the tenants' back doors. I do not think this necessarily referred to a contractual obligation, and I do not think it could be used for the purpose of construing the lease. It might be treated as an admission upon another branch of the case, but I observe that no question was put to defendant about the letter, and its rather ambiguous and obscure references were not very clearly explained, nor very seriously relied upon.

I now come to the circumstance constituting the obstruction which is complained of. No trouble arose while the house was tenanted; but in the summer of 1902 it was untenanted, and in the hands of a caretaker. The caretaker's children used the door for generally raiding and trespassing upon defendant's field and cabbage garden. The defendant, in order to protect his lands from trespass, put a padlock upon his side of the door. Plaintiff's brother, who at that time was the person entitled to the lessee's interest in the lease, upon hearing of this, went to the premises, climbed the back wall and removed the padlock. Defendant remonstrated, but plaintiff's brother insisted that he had a right to the use of the door. Apparently he did not claim any particular right of way at that time, but a general and indiscriminate use of the door. Defendant, being unable to protect his premises from trespass, built a wall opposite to, and almost against, the door, which is the obstruction complained of.

Having disposed of these matters which required notice in the first instance, I come to the real question at issue at the trial.

namely, the question whether the right to these ways, or either of them, ought to be held to have passed by implication with the lease. The house was practically a new one. One tenant occupied it for a short time before plaintiff's father took the lease of 1888. But having regard to the date of the head lease of 1886, and to the fact that the house was the second one built upon the plot after the date of the head lease, the occupation of that tenant must have been brief. No question was put suggesting any previous user of these ways, or either of them, before the lease of 1888. There is no evidence of any previous user. Accordingly, this is not a case in which, in order to enjoy the premises "in the usual manner as previously enjoyed," there was any "necessary dependence" upon the adjoining lands. For similar reasons the ways could not be described as "appertaining" or "reputed to appertain." No argument has been founded upon the general words in the lease "with the rights, members, and appurtenances thereunto belonging or in anywise appertaining," nor has it been suggested that section 6 of the Conveyancing Act, 1881, has any bearing upon the case.

There can be no doubt that from and after the date of the lease of 1888, down to the summer of 1902, the tenants in occupation of No. 19, Harcourt-terrace (which was not occupied by plaintiff, but was let to sub-tenants by her and her predecessors in title) have been in the habit of having their coals delivered at the back door. The coal merchants' carts have always been allowed by defendant to come across the defendant's building plot at the rere entering at the canal gate, which is defendant's business entrance. At this gate defendant has business offices and premises, and his caretaker lives there. The key of this canal gate is kept by the defendant or his caretaker, and the gate was opened by them to allow carts to enter for the purpose of delivering coal at the back of plaintiff's house. It appears that occasionally the back door was used for some other special occasion, *e.g.* bringing in furniture, and on one occasion a greenhouse. But the delivery of coal has been the only regular purpose of the user. The building plot over which the carts have passed is a rough, waste plot of ground used by defendant, pending any further building operations, partly as a builder and contractor's yard, and partly as a

Barton, J. 1904. DONNELLY v. ADAMS.

cabbage garden. When defendant planted part of it in cabbages, he left a space between the cabbages and the rere of these houses for the delivery of coal; but this took place some years after the making of the lease. In support of their case I need hardly say that plaintiff's counsel do not contend that by the user since the date of the lease of 1888 she has acquired an easement over her landlord's property. That is, of course, impossible for the reasons given in the well-known case of *Gayford* v. *Moffatt* (1). Plaintiff's case is not rested upon prescription or lost grant or any ground of that kind. Her counsel rely upon the subsequent user, only as evidence of an implied grant.

In addition to the subsequent user, plaintiff's counsel rely upon the existence of this back door as part of the demised premises, and upon the inconvenience of bringing coal in by the front door. This is plaintiff's strongest point. It is, I think, established that in the back garden was a door, which had all the appearance of an ordinary back door of a house of the kind. In the back garden there was a small grass plot, and a path from the back of the house to the garden gate. The coal-cellar of the house opened into the kitchen, and also had a door to the back garden. It is to be noted that there was no sign of anything upon the adjoining lands connected with, or apparently intended for, the use of this back garden, or coal-cellar. The coal-hole had no opening or communication into the adjoining lands. In this respect this case is quite unlike such cases as *Hinchliffe* v. *Kinnoul* (2), where a coal-shaft in the demised tenement had an opening or coal-shoot which was actually on the alleged servient tenement, and had long been used for filling the coal-cellar belonging to the demised premises. In the present case there was nothing of the kind. It was said there was a step into the adjoining lands, but it seemed to me, upon the evidence, confirmed by a careful inspection of the premises which I made at the request of both parties, accompanied by the plaintiff's solicitor and by the defendant, to be an ordinary door-sill. I find no evidence of the existence of anything at the date of the demise upon the alleged servient tenement apparently intended for the use or benefit of the

(1) L. R. 4 Ch. 133. (2) 5 Bing. N. C. 1.

alleged dominant tenement. There was, upon the alleged dominant tenement, this back door, with the usual requisites of a door, such as lock, bolt, and sill. But it is an undisputed fact in the case that there was no back lane or back passage, or defined way of any kind passing along, or leading to, or connected with, this back door. The back door opened to a pathless field or piece of ground. The authorities seem to show that the Courts will not, as a rule, imply a right of way when there was no visible way on the servient tenement at the date of the demise. This requirement of a visible way upon the servient tenement at the date of the demise is not a fanciful or technical requirement. It is a question of principle; because what the Court is asked to infer is the *implied* demise of an *apparent* quasi-easement. In the present case there was no such visible way at the date of the lease. Since the date of the lease a sort of track has been caused by the passing of defendant himself, who resides next door in No. 18, to and from his place of business, which is at the gate on the canal road, or by building operations at the adjoining house, or by coal carts coming to deliver coals. At the date of the lease there was no track the result of previous user, nor any formed or made way apparently intended for future user, such as was an important element in *Brown* v. *Alabaster* (1). We have, it is true, in the present case a purpose of convenience apparently capable of being served upon the dominant tenement, but we have nothing on the servient tenement apparently intended to serve that purpose.

The subject of implied grants or demises of quasi-easements, upon a severance of tenements, has undergone some development in recent years. The general rule has often been stated that in addition to easements of necessity there will pass, or at all events always may pass, with or without general words, all continuous and apparent quasi-easements previously used, or apparently intended to be used, for the convenient enjoyment of the demised premises. The distinctions between apparent and non-apparent, and between continuous and discontinuous, easements are traceable, as pointed out by Lord Blackburn in *Dalton* v. *Angus* (2), to the Code Civil, where definitions of these terms may be found in

(1) 37 Ch. D. 490. (2) 6 App. Cas. 740, at p. 821.

Barton, J. 1904. DONNELLY v. ADAMS.

Articles 688 and 689. Examples of quasi-easements which are, in the strictest sense of those terms, continuous and apparent, are afforded in cases involving questions of light, support, and natural water courses. But our law has extended the rule to quasi-easements which are not, according to the strict or primary meaning of those terms, continuous and apparent, but which may be regarded as analogous to or in the nature of apparent and continuous rights. For example, a very ordinary case of a quasi-easement which may be implied in a demise involving a severance of tenements is a covered drain draining the dominant tenement into or through the servient tenement. Such a drain is not, strictly speaking, apparent, but may be regarded as such for the reason given in *Pyer* v. *Carter* (1) and elsewhere, that it would be apparent upon a reasonably careful inspection; nor is it, strictly speaking, continuous, but may be regarded as continuous, because there is a necessary and permanent dependence of the house upon the drain for its enjoyment as a house in the state in which it was conveyed or demised, as was pointed out by Mr. Willes in a passage given in Gale (7th ed., p. 123). Similarly a right of way is not, strictly speaking, a continuous right; but it is a very ordinary example of an implied quasi-easement of convenience upon a grant or demise of a severed tenement.

Where there was at the date of the grant or demise upon the alleged servient tenement a made or marked way previously used, or apparently intended to be used, in connection with a back door or back gate upon the demised tenement, a right of way may pass by implication as being in the nature of an apparent and continuous quasi-easement. If there had been in the present case a back lane or back passage or any other made or defined way upon the servient tenement connected with, or apparently intended to be connected with, the back door, plaintiff's claim might, in my opinion, be maintainable. *Brown* v. *Alabaster* (2) is an example of such a case; in that case there was a formed and fenced way upon a servient tenement. *Clancy* v. *Byrne* (3) is an example of an Irish case of an implied right of way; and in that case there was a "passage" upon the servient tenement which was, at the

(1) 1 H. & N. 916. (2) 37 Ch. D. 490. (3) I. R. 11 C. L. 355.

date of the demise, the "usual" and "manifest" mode of access. In fact, it seems to me that the authorities upon this subject of implied grant of ways of convenience contain many dicta which lay stress upon the materiality of this element of a made or marked way upon the alleged servient tenement, whenever a claim is set up to an implied grant of "a right of way," not being a way of necessity.

The first case to which I wish to refer is *Langley* v. *Hammond* (1) in which the defendant took a surrender of a strip of land "with all ways therewith now used, occupied, and enjoyed," and the question was—whether by this surrender there passed to, or was created, in favour of the defendant, a right to use a certain way or track which gave access to the surrendered strip of land. The Court held not. I do not refer to the case for the purpose of citing the decision, which as regards the *ratio decidendi* of the majority of the Court has been over-ruled. Bramwell, B., however, decided the case upon different grounds, namely upon the ground of the absence of any defined road upon the alleged servient tenement; and I refer to the case only for the purpose of quoting a passage from his judgment which has been so often referred to with approval, that it must be regarded as a passage of considerable authority. At p. 170 he says:—"Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is, that there is here really *no defined road.* It is said that it is hard and gravelled, but in truth as soon as you turn out of West Street, you do not come into what is a road and nothing else, kept for no other purpose, but into a rick-yard, where the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as will pass under general words; it is no more a way (if I may use the

(1) L. R. 3 Ex. 161.

Barton, J. 1904. DONNELLY v. ADAMS.

illustration) than the short cut a man may take across his room from the piano to the fireplace is a way. In one sense, no doubt, it is a way which he may use, but he only uses it equally with ways in other directions, by virtue of his rights of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to."

In *Watts* v. *Kelson* (1), which was a case of an artificial water course extending through the servient tenement and the dominant tenement, and bringing water continuously for the use of the occupier of the dominant tenement, it was held that the construction of the water course on the servient tenement and its continuous use for the benefit of the dominant tenement rendered it "in its nature continuous." Mellish, L.J., at page 172, referring to quasi-easements of way, says:—"When a man walks over his own land in a particular direction, he is not using anything, he is merely going where he pleases on his own property; but when there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man construct *a paved road* over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field." Afterwards Mellish, L.J., at page 174, in the course of his judgment says:—"We may also observe that, in *Langley* v. *Hammond* (2), Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, *if there was a formed road* made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." Baron Bramwell's judgment in *Langley* v. *Hammond* (2) was also referred to with approval by Lush, J., in *Kay* v. *Oxley* (3), where the right was claimed over a "private road," and in *Barkshire* v. *Grubb* (4), where there was a "gravelled path."

A few years afterwards, in *Bayley* v. *Great Western Railway Company* (5), Fry, L.J., summarises the authorities up to that

(1) L. R. 6 Ch. 166.
(2) L. R. 3 Ex. 161.
(3) L. R. 10 Q. B. 360.
(4) 18 Ch. D. 616.
(5) 26 Ch. D. 434, at p. 456.

date upon this subject as follows:—"It appears to me that the cases of *Watts* v. *Kelson* (1) and *Kay* v. *Oxley* (2) have laid down a general principle of construction which I think may be stated in this way, that if one person owns both *Whiteacre* and *Blackacre*, and *if there be a made and visible road* over *Whiteacre*, and that has been used for the purpose of *Blackacre* in such a way that if two tenements belonged to several owners there would have been an easement in favour of *Blackacre* over *Whiteacre*, and the owner aliened Blackacre to a purchaser, retaining *Whiteacre*, then the grant of Blackacre either 'with all rights usually enjoyed with it,' or 'with all rights appertaining to *Blackacre*,' or probably the mere grant of *Blackacre* itself without general words, carries a right of way over *Whiteacre*. That appears to me to be the result of those cases." *Ford* v. *Metropolitan Railway Company* (3) was referred to in the course of argument, and I may point out that the right in that case was claimed over a "hall" or "vestibule."

The same point was again alluded to by Fry, L.J., giving the judgment of the Court of Appeal in *Thomas* v. *Owen* (4), which was a case of implied reservation, not of implied grant. At p. 231 of the report he referred to the general rule that none but continuous easements and easements of necessity can pass by implied grant without express words, and proceeded to say:—"But on this principle, as established by such decisions, there has been engrafted by other decisions an exception *in the case of a formed road* made over an alleged servient tenement to and for the apparent use of the dominant tenement;" and he refers to the judgment of Bramwell, B., in *Langley* v. *Hammond* (5) and to *Watts* v. *Kelson* (1) as authorities for that proposition. On the same day judgment was delivered by Kay, J., in the Chancery Division in the case of *Brown* v. *Alabaster* (6), which was a case more resembling the present case than any of the others to which I have referred. It differed, however, from the present case in this, that there was a formed and fenced way leading to a back gate of the particular house in question. At page 500, in stating the facts Kay, J.,

(1) L. R. 6 Ch. 166.
(2) L. R. 10 Q. B. 360.
(3) 17 Q. B. D. 12.
(4) 20 Q. B. D. 225.
(5) L. R. 3 Ex. 161.
(6) 37 Ch. D. 490.

Barton, J. 1904. DONNELLY v. ADAMS.

was careful to point out that at the time the defendant bought the house this formed back way was existing, and he held that the right to use it passed as an implied grant of a quasi-continuous and apparent easement. I wish particularly to refer to a passage in his judgment in which he sums up the law in very clear terms. At page 507 after referring to a difference of judicial opinion, not material for our present purpose, he says :—"I leave that contest where it is; but it seems to me that the law is this—that a *particular formed way* to an entrance to premises like these, '*Westbourne*' and '*Cottisbrook*,' which leads to gates in a wall, part of those demised premises, and without which those gates would be perfectly useless, may pass, although in some sense it is not an apparent and continuous easement; or rather, may pass—because, *being a formed road*, it is considered by the authorities, in cases like this, to be a continuous and apparent easement—by implied grant without any large general words, or indeed without any general words at all."

In *International Tea Stores Co.* v. *Hobbs* (1) the case mainly turned upon the question whether a right of way, which had been enjoyed *de facto*, but permissively, passed by virtue of the general words incorporated in the deed of conveyance by section 6 of the Conveyancing Act. In the course of the discussion of the case the question whether the way was a sufficiently formed road became material, and some doubt was thrown on the subject, the way in question having, as I gather, been "made" but not "paved." However, in the conveyance the premises were described "as bounded by a roadway," and Farwell, J., held that the defendant was estopped by this statement in the conveyance from denying that the way was a formed road. I infer that, in the opinion of the learned Judge, if it had not been for the estoppel, the absence of evidence establishing the existence of a formed way at the date of the demise would have been fatal to the plaintiffs' claim. I shall quote a short passage from the judgment. At page 173, Farwell, J., said :—"There is one point I omitted to mention. The cases which have been referred to turn in a great measure on the fact that there was *a made roadway* leading to the plaintiff's

(1) [1903] 2 Ch. 165.

premises. In this case there was a way made, although it was not paved on the plaintiffs' side until quite recently; and in my opinion, on the authority of *Roberts* v. *Karr* (1), the fact that the conveyance states that the property is bounded by a roadway constructed and leading to the yard estops the defendant from saying there is not in fact a roadway which necessarily passes the door in the plaintiffs' wall opening on to the yard." Now in the present case, in the lease to the plaintiff, the demised premises are described as bounded on the east, that is the rere, "by ground in the possession of the said Stephen Adams," so that there is not in the present case any estoppel which would prevent the defendant from saying what was the truth, namely, that the door in question opened upon ground upon which there was no defined road or path of any kind whatever.

There is a well-known Irish case, *Clancy* v. *Byrne* (2), which has been often cited and followed in this country upon this subject of implied grants of rights of way of convenience. In that case the Court of Common Pleas applied to rights of way the principle of the House of Lords' decision in *Ewart* v. *Cochrane* (3) (which was a case of drain to a cesspool in the servient tenement). In *Clancy* v. *Byrne* (2) the way was claimed over "a passage" described as a "usual" and "manifest" mode of access to the dominant tenement. Lawson, J., in delivering the judgment of the Court, gives the following illustration at page 359:—"If a landlord lays out his ground for building in lots, and makes a *common avenue* for all the houses leading out through other lands of his to the high road, then, although it was not a way of necessity by reason of there being another passage out to the road, not going through the other close of the landlord, still it would be, in each case, for a jury to say whether, under a letting of the house, the right to use *the avenue* would not pass to the tenant." Afterwards he refers to *Langley* v. *Hammond* (4) and *Watts* v. *Kelson* (5); and speaking of the case of a way made for the convenience of the property by the owner of both closes, adds:—"There, if he part with the one, the way, *if marked out* and necessary for the

(1) 1 Taunt. 495.
(2) I. R. 11 C. L. 355.
(3) 4 Macq. H. L. Cas. 117.
(4) L. R. 3 Ex. 161.
(5) L. R. 6 Ch. 166.

Barton, J. 1904. DONNELLY v. ADAMS.

convenient enjoyment of the close, will pass." I understand Lawson, J., to lay down two requirements, which he would expect to find in such a case, that the way should be necessary for the convenient enjoyment of the demised close, and that it should, at the time of the demise, be a marked or defined way.

Before I leave this subject I wish to refer to two passages from judgments of Lindley, L.J., and Bowen, L.J., in *Baring* v. *Abingdon* (1), in which reference was made to the point under discussion. That was a case in which one of the claims put forward was a claim to an implied right of common; and in the course of the judgments reference was made to implied rights of way. At p. 390, Lindley, L.J., says, referring to a passage in Gale on Easements:—"I would merely observe in passing that the immediately preceding passage in that book has been somewhat modified by more recent decisions, beginning with *Kay* v. *Oxley* (2) and coming down to the present time, to the effect that if there is *a visible road* obviously used by a person over land of his own for the enjoyment of his house, and he grants that house, a right of road may pass, although it did not exist as a right distinguished from ownership before the date of the grant. It is impossible to invoke that class of cases here, for it cannot be said that on an inspection of the parcels there is anything visible which stands in the same position as a visible road, without which the property cannot be enjoyed. The mere fact that there are here several parcels of waste puts an end to any argument of that kind. If it is said that it is necessary to enjoy pasture over one particular piece of the waste, the question immediately arises why that piece, rather than any other piece. We need not therefore consider such cases as *Thomas* v. *Owen* (3)." At the foot of p. 398, Bowen, L.J., says:—"The case of continuous apparent easements has been sometimes called an exception from the general law, but I doubt whether it is strictly an exception. It seems to me to be only an illustration of the principle. Where you find a *formed road* which is obviously and visibly laid out for the purpose of rendering the enjoyment of a particular house or land more feasible, the right to enjoy the *formed road* passes by implication, certainly when there are words

(1) [1892] 2 Ch. 374. (2) L. R. 10 Q. B. 360. (3) 20 Q. B. D. 225.

capable of passing it, and I see no reason to think that it would not pass in a similar case without any words at all." These passages of high authority illustrate the materiality of the existence of a formed or visible road in cases of this kind.

The requirement of a defined way rarely calls for direct decision or discussion, because it is rare to find a right of way, not a way of necessity, claimed, as it is in the present case, when there was upon the servient tenement at the date of the demise nothing capable of being described or identified as a "way." The majority of the passages from judgments which I have quoted occurred in cases which turned partly upon words, in a lease or conveyance, relating to ways previously enjoyed, or upon facts involving previous enjoyment by user. The requirement of a formed or defined way upon the servient tenement at the date of the demise seems to arise *a fortiori* where there has been no previous user, and where the plaintiff rests his case mainly, if not solely, upon evidence afforded by the condition and appearance of the dominant premises when demised, and upon convenience and subsequent user. The reasonableness of such a requirement is illustrated by the circumstances of the present case. If the plaintiff acquired by implication the right which is claimed, it would practically render the rest of defendant's building property which he retains in his own hands useless for its most appropriate purposes. If plaintiff and her undertenants have rights of way from their back door to either or both of the corners of defendant's building plot, the defendant could not build upon it, or use it in any way inconsistent with the exercise of these rights. It seems reasonable to suppose that, in the absence of any sign upon the alleged servient tenement, the parties would, if they had contemplated such a right as this, have made it the subject of some express covenant or stipulation.

On the whole, I am for all these reasons of opinion that in this case the plaintiff has not established her claim to these alleged rights of way, or to either of them. I am afraid that I have been led to state my reasons at undue length; but the importance of the question which the plaintiff has raised by her claim of an implied demise of this indefinite right of way must serve as my excuse.

D. M'C. M.

Appeal. 1904. DONNELLY *v.* ADAMS. Dec. 6, 7.

The plaintiff appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Walker, and Holmes, L.JJ.).

Ronan, K.C., and *Garrett W. Walker*, for the appellant:—

If the Court should be of opinion that there is not sufficient evidence of an apparent path running from the back door across the defendant's land to either of the gates opening on the highway, we say that the judgment appealed from is wrong in saying that it is necessary to show an apparent path where, as here, the right claimed arises from implication. The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way which is used and which is reasonably necessary for the reasonable and comfortable use of the part granted is also intended to be granted: *per* Bowen, L.J., in *Bayley* v. *Great Western Railway Company* (1); Shelford's Real Property Statutes, p. 63. We contend for a right which is necessary for the convenient and beneficial use and occupation of the premises demised as a residence: such a right, though not strictly a way of necessity, can be implied as between lessor and lessee: *Geraghty* v. *M'Cann* (2); *Pheysey* v. *Vicary* (3); *Hinchcliffe* v. *Lord Kinnoul* (4); *Ewart* v. *Cochrane* (5). The condition of the premises at the time the lease was granted, with a back door obviously intended to be used, fortifies the implication: *Glave* v. *Harding* (6). There is an implied obligation on the lessor not to derogate from his own grant of a house with such existing convenient mode of bringing in coals: *Grosvenor Hotel Company* v. *Hamilton* (7); *Aldin* v. *Latimer & Others* (8); *Clancy* v. *Byrne* (9). The right the plaintiff claims is to be implied because the subject-matter demised—a residential house—is so constructed that parts of it involve a "necessary dependance" in order to its enjoyment in the state in which it was leased upon the adjoining tenement: *Pearson* v. *Spencer* (10). The existence of the doorway and the giving of the key in this case take the place of the

(1) 26 Ch. D. at p. 452.
(2) I. R. 6 C. L. 411.
(3) 16 M. & W. 484.
(4) 5 Bing. N. C. 1.
(5) 4 Macq. H. L. C. 117.
(6) 27 L. J., Exch. 286.
(7) [1894] 2 Q. B. 836.
(8) [1894] 2 Ch. 437.
(9) I. R. 11 C. L. 355.
(10) 3 Best & Sm. 761.

apparent and visible way said by some of the cases to be necessary. In Gale on Easements (7th ed.), p. 137, it is expressly stated that "where the apparent sign of user is a part not of the tenement retained—but of the tenement conveyed, such as a substantial and permanent doorway"—the doctrine of implied grant applies.

Matheson, K.C., and *Maxwell*, for the respondent:—

The obstruction complained of is on the defendant's own land; therefore the onus is on the plaintiff of showing that it is wrongful. In order to do this, she claims a right of access through the back door to and over the defendant's land. There is no evidence of any user of such a right prior to the lease. The claim is virtually for a right of way. There is clearly no express grant of any such right; on the contrary, the map on the lease negatives any such right by omitting to show it.

Express grant being out of the case, can there be an implied grant? At law the grant of such a right is implied in only two cases, (1) where the right of way claimed is for a way of necessity strictly so called; (2) where the easement is continuous and apparent. There is no physical necessity here for the coals to be brought in by the back; this is plain from the fact that they are at present brought in by the front door. A way cannot be claimed as a way of necessity simply because it is a more convenient way than the existing mode of access: *Dodd* v. *Burchell* (1). The plaintiff's advisers saw it was necessary to show that there was a continuous and apparent easement, and they accordingly pleaded that there existed "two well-defined passages or ways leading from the said back door across the field." This was the substance of the plaintiff's case, and it failed in proof.

The authorities are clear that (except in cases of necessity) where the easement is not apparent and continuous, a grant will not be implied: *Barkshire* v. *Grubb* (2); *Bayley* v. *Great Western Railway Company* (3); *Thomas* v. *Owen* (4); *Baring* v. *Abingdon* (5); *International Tea Company* v. *Hobbs* (6). All the cases where a

(1) 1 H. & C. 113; 8 Jur. (N. S.) [1180.
(2) 18 Ch. D. 616.
(3) 26 Ch. D. 452.
(4) 20 Q. B. D. 225.
(5) [1892] 2 Ch. 374.
(6) [1903] 2 Ch. 165.

Appeal. 1904. DONNELLY v. ADAMS.

way of qualified necessity was held to pass were cases where there was a formed or visible way or track: *Geraghty* v. *M'Cann* (1); *Clancy* v. *Byrne* (2); *Pheysey* v. *Vicary* (3); *Brown* v. *Alabaster* (4).

Dec. 7.

LORD ASHBOURNE, C.:—

In 1886 the defendant took a lease of a large field, then vacant, for the purpose of constructing a row of houses on the opposite side of the road facing Harcourt-terrace. Amongst others he built this house No. 19, and in 1888 demised it to the plaintiff's father, who was her predecessor in title. It is an ordinary residence built for a gentleman of moderate means with the usual accommodation provided in such houses. In the back wall of the garden is a door, which, prior to the acts complained of in this action, opened out on that portion of the defendant's field which is not yet occupied by buildings. In the plans submitted to the Corporation before any of the houses were erected, a lane-way was shown at the back of the proposed houses; and if these plans had been carried out, the door would open out upon a lane-way, and would serve for all the purposes for which the back door of such a house might be required. The main purpose indicated in the present case as necessary is the bringing in of coals. The question we have to decide is whether the plaintiff is entitled to maintain this action against the defendant, her landlord, for the interruption and obstruction of the right of way (for the purpose of bringing in coals through this door) which she alleges was conferred on the lessee on the occasion of the letting, the lease being totally silent on the matter.

The way the plaintiff put her case in the statement of claim is that she had the right to pass from the back door to two highways, across the defendant's field, by two marked and defined ways. Barton, J., largely founds his careful judgment on the ground that there was in fact no such marked and defined way. But that there was a back door is unquestionable, and such a thing is not frequently made except to be used. Further, in the

(1) I. R. 6 C. L. 411.
(2) I. R. 11 C. L.
(3) 16 M. & W. 484.
(4) 37 Ch. D. 492.

arrangement and plan of the house the receptacle for coals was situated so as to be conveniently approached and filled from the back door. Again, while negotiations were in progress between the defendant and the plaintiff's father, a conversation took place about the back door, which shows that it was not put there for idle ornament, but for the convenience of the house. The tenant required that he should be given a right of way through the door for the admission of coal into the house, and the defendant said that he "could not give him a right of way, under the circumstances," but that he "would *allow* him to get in his coals when he wanted." We are asked to translate this conversation to mean only that the defendant would give leave or permission which would be revocable the next day. I cannot believe that the word "allow" was either intended or understood to imply nothing more than a license or permission revocable at the will of the defendant—especially when there was not one syllable said about license or permission. Finally, in addition to the existence of the back door, the arrangement of the house, and the conversation, we have the fact on which I lay the utmost stress, that from the date of the letting down to the quarrel about the trespass of the little children, coal was always brought in by the way now claimed by the plaintiff. That is, the user corresponds with the plaintiff's case. I arrive at the conclusion that at the time of the letting the understanding of the parties was that the coal was to be conveyed from the outer door or gate at the corner of the field, and introduced into the house through the back door. I arrive myself, as a juror, at the conclusion that this user was reasonably necessary for the use and enjoyment of the dwelling-house demised; and I think that the right to it as an incident of the occupation of the house was implied in the letting.

We were pressed by Mr. Maxwell that in order to confer the right claimed, as there was no written contract respecting it, there should be a marked way or track from the back door to one or other of the outer gates. But it was present to the minds of the parties that the tenant was to get in his coal in the manner I have mentioned, through either of the outer gates and across the field to the back door, and without being marked out the way across the field from either of the gates was defined with sufficient clearness;

Appeal. 1904. DONNELLY v. ADAMS. Lord Ashbourne, C.

while it remained competent for the defendant to vary the route from time to time or to limit it to either outer gate.

All I have said shows that if the law will not interfere on behalf of the plaintiff, it would be an unfortunate state of the law.

In *Geraghty* v. *M'Cann* (1), a case tried with a jury before Chief Justice Monahan, he, with that robust sense which the older members of the Bar recollect, left to the jury the question—"Was the way necessary for the fair and reasonable enjoyment of the premises?" and the Court, in a judgment delivered by Mr. Justice Lawson, held that that was a proper question to leave to the jury. In *Hinchcliffe* v. *Kinnoul* (*Earl*) (2) the question on which the special verdict was taken was, "Was the way necessary for the convenient use and occupation of the messuage and premises?" and in *Pheysey* v. *Vicary* (3) the question was stated by Parke, B., to be "whether the way was necessary to the convenient enjoyment of the dwelling-houses." The passage in Shelford (10th ed.), p. 63, and the words read from the judgments of Bowen, L.J., in *Bayley* v. *Great Western Railway Company* (4) and *Baring* v. *Abingdon* (5), show that the law recognises such a thing as a way of qualified necessity—a way which, though not physically a necessity, is necessary for the comfortable and beneficial enjoyment of the premises for the purpose for which they were let. The same authorities show that the right to such a way may be conferred by implication.

In my opinion the right to get in coals by his back door was necessary for the comfortable and beneficial use of this dwelling-house; and following the authorities I have mentioned, and supported by the conversation above referred to, I arrive at the conclusion for which Mr. Ronan and Mr. Walker contended, that the letting was intended to confer, and did confer, a right such as I have indicated, for the purpose I have mentioned.

Our judgment must be to allow the appeal, and to direct the removal of the obstruction.

(1) I. R. 6 C. L. 411.
(2) 5 Bing. N. C. 1.
(3) 16 M. & W. 484.
(4) 26 Ch. D. at p. 452.
(5) [1892] 2 Ch. 374, at p. 398.

FITZ GIBBON, L.J. :—

I concur. I can best state the effect of our decision by reading the Order which we propose to make :—

> "It appearing to the Court, upon the evidence, and the condition, user, and circumstances of the demised premises and of the adjoining lands, that the lease of August 16, 1888, in the pleadings mentioned, was made by the defendant Stephen Adams to P. J. Donnelly, the predecessor in title of the plaintiff, upon the terms that, during the continuance of the said lease, the occupiers of the house thereby demised should have the right to use the door opening from the demised premises into the land in the possession of the defendant, and bounding the said premises on the east, for the purpose of bringing in coal for the use of the inhabitants of the said house; with the further right of passing and re-passing, at reasonable times and in a reasonable manner, with horses and carts, for the purpose aforesaid, across the said land in the possession of the defendant, between the said door and the public highways adjoining the said lands of the defendant, over such convenient part of the said lands, and through such gate or other convenient entrance thereto, from such of the adjoining highways as the defendant should from time to time appoint; and it further appearing that the defendant has wrongfully obstructed the right aforesaid by the erection of a wall across the said door; let an injunction issue to restrain the defendant from obstructing the right defined as aforesaid, and from maintaining the said wall."

I have rarely seen a more deplorable piece of litigation. It originated from the temporary abuse of the passage afforded by the back door by the caretaker's children. That was followed by an arbitrary and illegal act of the defendant in fixing a padlock on the back door. The tenant then, acting within his rights, got over the wall and removed the padlock. Thereupon the defendant built a wall across the door, and thereby rendered it useless. He built this obstruction as an assertion that the plaintiff had no right to use the door, and that it had been previously used under a revocable licence. Then this action was brought, the pleader claimed for the plaintiff two defined ways across the field from the back door to two public highways; the defendant joined issue, denying that the plaintiff had any right whatever to use the door.

The pleadings cannot affect the rights of the parties, and the case has been conducted and decided on other lines.

Appeal. 1904.

DONNELLY *v.* ADAMS.

Fitz Gibbon, L.J.

Barton, J., says:—

> "Plaintiff's counsel more than once declared that the plaintiff is willing to take a way in any direction or to any terminus, so long as she gets access from the back door to the public road. In other words, they say that if they fail to establish a right to a way in any definite direction, they are willing to leave the selection of the route of the way to the defendant. That would appear to be a very reasonable attitude, if this way could be claimed as a "way of necessity." But it is admitted that it cannot be claimed as a way of necessity. It is a highly convenient way, but the back garden can be approached, and for the last two years has been always approached, from the front door, although that mode of access is accompanied by inconvenience. Some passages were cited from judgments of authority which serve to indicate how easements of convenience may approach sometimes very near to easements of necessity, being in fact in a sense easements of "qualified necessity." But the distinction in principle between "ways of necessity" and ways of "convenience" is for certain purposes well marked and well settled, and, in a case like the present, deserves to be carefully borne in mind.

He held that there was no way of necessity, and that a way of convenience such as that claimed by the plaintiff can not exist unless there is a *defined* way—meaning thereby a visibly marked path.

In 1888 the house was not a new one. It was built by Adams, who had let it to a tenant before the lease to Donnelly was made. We have no clear evidence as to how the first tenant used the door; after the determination of his tenancy, and on the occasion of the letting to Donnelly, the conversation to which the Lord Chancellor has referred took place. What was then the structure of the house? There was a back door leading from the garden into a field belonging to Adams. Through the garden a concrete walk led from the back door to a coal-hole or bin, a visible indication of the normal way by which coals were to come in. The coal-bin opened into the kitchen. Any other way of getting in coals would be most inconvenient, having regard to the size and structure of the house, which were known to both parties. In the conversation, which took place on the spot, the intending lessor told the intending lessee that he could not give him the unlimited use of the back door, but at the same time he told him that he was to be allowed to use the back door for the purpose of bringing his

coals into the house. The key of the door was then and there given to the lessee, for the purpose of enabling him to bring in his coal through this door.

The law is stated in *Geraghty* v. *M'Cann* (1). I admit that neither by express nor by implied grant can a vague or uncertain right be created. Every lawful way must be capable of identification; it must have a *terminus a quo*, and a *terminus ad quem*. But it is not essential to a way that there shall be a beaten track between its *termini*. The precise line which a person must follow in exercising a right of way need not always be the same; frequently the owner of the servient tenement may vary it from time to time, as where there is a right to cross a field which is sometimes in tillage. The reasonable use of the servient tenement, consistently with the servitude, may entitle the owner of it to require the dominant owner to diverge, and the easement may coexist with the right of the owner of the servient tenement to vary the path from time to time.

There is conclusive evidence, in the plans and otherwise, that Adams, when he got his lease, intended to build a row of houses, each with a back door giving access from the rear across his field to one or other, or both, of the neighbouring streets. But he had not made up his mind, and he did not determine, to which highway the right of access was to be given. The field was subsequently laid out on a different plan, but still providing access to the back door of each house. I am satisfied that Adams could, at any time, or from time to time, assign the way most convenient to himself as that by which the tenants of the houses should go, provided it was reasonably fit for bringing in coals. Donnelly's right was to get his coals in through whatever gate into the field, and by whatever way across the field, Adams assigned for the time being.

Between the gate and the door Adams could direct the route by which the coals were to come; he could use his field as he pleased, consistently with leaving convenient access to Donnelly's back door, at proper times and in a reasonable manner, for the purpose of "coaling" Donnelly's house. We have not been asked to go further, and, perhaps, the intention of the parties was

(1) I. R. 6 C. L. 411.

Appeal. 1904.

DONNELLY v. ADAMS.

Fitz Gibbon, L.J.

confined to coals. But the same principle would apply to all reasonable uses of a back door contemplated by the landlord and tenant, when the letting took place.

That this user was to be merely permissive is inconsistent with the conversation, and with the giving of the key, and with the structure of the house, and with a degree of convenience which amounts to "qualified necessity." All these justify the inference —which I draw without doubt—that it was a term of the contract for the lease, collateral to the letting, and covered by its consideration, that the lessee should be entitled as of right to bring his coals in by the back door, and to cross Adams field for that purpose. The subsequent conduct of the parties, until the quarrel over the trespass of the children, is all in favour of this view.

I rest my judgment on contract, and on contract only, but on that ground the plaintiff is, in my opinion, clearly entitled to relief.

WALKER, L. J. :—

I concur. The covenants in the lease under which the defendant holds are of importance. Adams thereby covenanted to build thirteen houses, and to lay down two roads, and he furnished to the head landlord a plan showing thirteen houses going back to a lane connecting Adelaide-road with the Canal bank. Having built this house, in part performance of the covenant, he let it to a Mr. Ormsby prior to the letting under which the plaintiff holds. I infer from the evidence that Ormsby used the back door for the purposes and in the manner now claimed by the plaintiff. What is the subject-matter of the demise ? It is the demise of a dwellinghouse with a back door and a receptacle for coals connected therewith by a concrete path ; and there is a covenant that the house must be used as a private dwellinghouse. If the relief here sought is denied, it will become absolutely necessary in this house, which must be used as a private dwellinghouse, to carry the coals through the hall door along the hall and inner passages to the coal hole, a most inconvenient and disagreeable incident in a residence of the kind. I come to the conclusion, as a matter of fact, that it is necessary for the reasonable and convenient use and enjoyment of the premises as demised that there should be this mode of bringing

in coals by the back door. The user and the conversation deposed to do not create the right, but are to be looked upon as fortifying it, and as showing the understanding of the parties as to the condition of the thing demised. It is urged for the defendant that the law requires that there should be a marked and defined way leading from the back door across the defendant's field, as there is not a continuous or apparent easement, in order to pass a right of way without an express grant. But the question which we have to consider is whether any way to the gate at the Canal impliedly passed—not on a particular track—but at all.

HOLMES, L.J. :—

In considering this action, it is important to bear in mind the history and structure of the plaintiff's house.

In 1886 the defendant acquired a lease of building ground having a frontage on Harcourt-terrace, a place in this city with which we are all familiar. Under the lease he was given two modes of access to the premises, one from Adelaide-road and the other from Harcourt-terrace. These were evidently intended as a convenient mode of approach to the reres of the houses which the lessee had covenanted to build; and the plan of the proposed buildings, deposited by him with the Town Council, shows that they were intended to have entrances at both front and back. This plan has not been carried out; but immediately after the demise, the defendant erected four houses, three of which—Nos. 17, 18, and 19—were alike in almost every respect. They are handsome dwellinghouses of their class, and I was surprised to hear that the one with which this action is conversant is let at £57 a-year. This may be to some extent accounted for by the fact that the letting was made after the defendant had built the wall complained of; but even so, the rent seems low. Behind this house there is a small garden enclosed by a wall and traversed by a concrete path to a door opening into the land retained by the defendant from which there is access to the approaches already mentioned by two gates. It is evident that the door was intended to be the back entrance through which articles like coal, that could not be conveniently brought in by the front hall, might reach the house. This is made even more clear by the situation of the coal-

Appeal. 1904. DONNELLY v. ADAMS. Holmes, L.J.

hole, the opening to which is from the back garden. In 1888, on the death of a previous tenant called Ormsby, the father of the plaintiff took a lease of No. 19, paying a considerable fine therefor. The defendant at the time of the letting gave the lessee the key of the back door; and from that date all the coal used on the premises was drawn to this door through one of the defendant's gates and over his land. The back doors of Nos. 17 and 18 were used for a like purpose; and there can be no doubt that this user was necessary for the convenient enjoyment by the several tenants of their houses. Once or twice articles other than coal were thus brought in, without permission asked or objection made; but this was exceptional. In fact, save on very rare occasions, coal was the only thing for which a back door was required. No. 19 was generally let to sub-tenants; but at the time of the act complained of in this suit, it was occupied by a caretaker whose children gave annoyance to the defendant, whereupon the latter without communicating with the plaintiff placed a padlock on the outside of the back door. In the course of the discussion that followed, the defendant denied the plaintiff's right to use this door for any purpose; and to make his position clear, he built a wall on his own ground within a few inches of the door, rendering all ingress or egress impossible. Hence the present action in which the plaintiff claims that the lease of 1888 granted by implication a right of way across the defendant's land between the back door and the public road. Whatever may have been once thought, it is now settled that a grant of a right of way may be implied in a conveyance or lease over land belonging to the grantor or lessor and remaining in his possession; but it is contended on behalf of the defendant that this can only be done when at the date of the grant or lease there was on the servient tenement some physical indication of the way such as a made road or beaten track. It seems to me that there is no legal principle requiring such an artificial limitation. If the lease in this case had contained in express terms a grant of a right of way for coal-carts from and to the back door over the defendant's land, it would have been good, although there was nothing to indicate the line or direction to be taken in exercising the right. In such a case the lessor would be at liberty to mark out any reasonably convenient way. I am of

opinion that a similar grant can be implied from satisfactory evidence, and that the evidence before us is more satisfactory than a beaten track. In point of fact there seems to have been such a track, but I do not attach importance to it because I think it arose in connection not with the door, but with the general building operations of the defendant. But we have the door placed in the wall with the coal-hole and the concrete path all constructed by the defendant himself. We have, not indeed the impossibility, but the great difficulty and inconvenience of bringing in coal for the use of the house in any other way; and we have the delivery of the key and user continuous and unchallenged for years. I attach little importance to the conversation with the lessee deposed to by the defendant. The lessee is dead; and in any case the recollection of what was said after fifteen years must be imperfect. The inference I draw from the evidence is that the lessee was told that he was not to have a general right of way, but a right to draw his coal. If he was not to have this right, why was the key given him? If it were a mere licence, I would expect that the key would be in the custody of the defendant's servant who had control over the outer gate. I think the reasonable inference from the other evidence is that the use was to be confined to coal. There is no stable or other out-building attached to the house; and the plaintiff is willing to accept the declaration in the form read by FitzGibbon, L.J. This will impose no real burden on the defendant who tells us that he always intended and still intends to make a lane behind these premises. The right alleged in the statement of claim could not have been supported; but this ought not to affect the result of the action which sprung from the defendant's denial of all right; and there is no doubt that in the Divisional Court as well as here, the case was discussed on the lines on which we have dealt with it.

Solicitor for the plaintiff: *Daniel Purcell.*
Solicitor for the defendant: *H. F. Leachman.*

G. Y. D.

Barton, J.
1904.
May 5, 6, 17.

Appeal.
Dec. 14, 15.
1905.
Jan. 20.

M'SWEENEY *v.* DRAPES.

(1903. No. 236.)

Ecclesiastical lease—Sub-lease—Covenant to renew toties quoties—*Purchase of fee by sub-lessor—Obligation to renew—Irish Church Act*, 1869 (32 & 33 *Vict. c.* 42, *ss.* 12, 34).

A cathedral corporation leased a plot of ground, part of their fee-simple property, for forty-one years, without any right of renewal, to a lessee, whose trustees, in whom the lease became vested, executed a sub-lease of the premises with a *toties quoties* covenant for renewal. The defendants, who were assignees in trust of the lessee, purchased the fee-simple from the Commissioners of Church Temporalities, under section 34 of the Irish Church Act, and obtained a conveyance, dated 7th August, 1879. On the expiration of the sub-lease in 1900, the sub-lessee called on the defendants to make to him a grant in perpetuity in pursuance of the covenant to renew, which they declined to do:—

Held, by the Court of Appeal (affirming the judgment of Barton, J.), that the sub-lessee was not entitled to relief.

Bernard v. *Hungerford* ([1902] 1 I. R. 89) and *Coey* v. *Pascoe* ([1899] 1 I. R. 125) approved of. *Postlethwaite* v. *Lewthwaite* (2 J. & H. 237) explained and distinguished.

TRIAL OF ACTION.

On the 28th November, 1860, the corporation of the Cathedral Church of St. Canice, in the diocese of Ossory, leased a certain plot of ground, containing 2 roods and 21 perches, part of the fee-simple property of the said corporation, and situate within the corporation of Irishtown and city of Kilkenny, to the Rev. Vernon R. Drapes, for a term of forty-one years, from the 25th March, 1861, at the yearly rent of £5 Irish. This lease contained no covenant for renewal.

On the 20th March, 1872, James Cumine, James George Robertson, and John Ryan, trustees of the lessee under a certain deed of 2nd April, 1863, executed a sub-lease of the aforesaid premises to William Hayes for a term of twenty-nine years from the 29th September, 1871, at the yearly rent of £20. This lease

contained a covenant by the lessors with the lessee that they, "their executors, administrators, and assigns, shall and will make, grant, and execute to him, the said William Hayes, his executors, administrators, or assigns, a like lease as this present demise whenever and as often as they, the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, shall themselves get a renewal of said premises, on the request, costs, and charges of the said William Hayes, his executors, administrators, or assigns, and on payment by him or them to the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, of such fine as they the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, shall have paid for such renewal, first having deducted therefrom the sum of 5*s.* sterling for each year granted over and above the term in the present indenture of lease then unexpired, and the lease or leases shall be for the same term or terms as the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, shall renew for, and at the same yearly rent as payable by the present indenture of lease."

All the estate and interest of James Cumine, James George Robertson, and John Ryan, in the premises, became vested in the Rev. Lombard Drapes and Thomas Drapes, the defendants in the present action, as trustees of an indenture of settlement dated 11th May, 1878.

In the year 1879 the defendants purchased the fee-simple of the premises from the Commissioners of Church Temporalities in Ireland under the provisions of the Irish Church Act, 1869, and by deed dated the 7th August, 1879, the premises were conveyed to the defendants in fee-simple.

All the estate and interest of the said William Hayes in the premises comprised in the above-mentioned sub-lease became vested absolutely in the plaintiff. This sub-lease expired on the 29th September, 1900. In the ordinary course the lease of the 20th November, 1860, would not have expired until the 25th March, 1902.

On the expiration of the sub-lease of the 20th March, 1872, the plaintiff called on the defendants to make to him a grant in

Barton, J. 1904.

M'SWEENEY v. DRAPES.

perpetuity of said premises pursuant to the covenant contained in said sub-lease, which, however, defendants refused to do.

Molony, K.C., and *Chaytor*, for the plaintiff:—

If the lessors had themselves gained a renewal, it would have enured for the benefit of their lessee. Instead of that, they acquired the fee, and are not bound in the same way as under the lease. Although the terms obtained by a lessor are different from those under which he held at the date of the sub-lease, he is still bound to renew: *Evans* v. *Walsh* (1); *Postlethwaite* v. *Lewthwaite* (2). The lessors are unable, through the provisions of the Irish Church Act, to give the exact thing they covenanted to give; but the equitable doctrine is well founded that where a person is, through his own acts, not in a position to do a particular thing he had agreed to do, but has put himself in a position substantially to comply with his undertaking, he is bound to do so: see the judgment of the Vice-Chancellor in *Lyttle* v. *Fox* (3), at page 352. No doubt in the Court of Appeal the case was decided on the express terms of the covenant; but Fitz Gibbon, L.J., and Walker, L.J., recognised the existence of this doctrine: see pages 357 and 363. Here the defendants get an estate sufficient to feed the covenant. In *Pilkington* v. *Gore* (4), the covenantor obtained a fee-farm grant, and thereupon the *toties quoties* covenant for renewal in the lease in that case became inapplicable, yet the covenantee could not defeat his own grant. *Coey* v. *Pascoe* (5) seems against our contention, but it is really distinguishable. That was a case of a purchaser for value from the covenantor, and not a case of covenantor and covenantee; while in the present case there was no assignment for value, but merely an assignment to trustees, and section 13 of Deasy's Act gives the tenant the same remedy against the assignee as against the original landlord. *Bernard* v. *Hungerford* (6) is distinguishable, the main ground of the decision being that the sub-lessee had twenty years previously refused to join, and was consequently debarred twenty years after from claiming any equity.

(1) 2 Sch. & Lef. 519.
(2) 2 J. & H. 237.
(3) [1898] 1 I. R. 340.
(4) 8 Ir. Ch. R. 589.
(5) [1899] 1 I. R. 125.
(6) [1902] 1 I. R. 89.

We also rely on the doctrine of graft. A fiduciary relation attached to the new estate acquired by the defendants as in *Gabbett* v. *Lawder* (1); *Randall* v. *Russell* (2).

Fetherstonhaugh, K.C., and *Garrett W. Walker*, for the defendants:—

We rest our case on three grounds—first, that under the Irish Church Act it was contemplated that all lands, except in the cases of archbishops' or bishops' lands, should be sold free from any customary privilege of renewal, and that it has not been shown that the defendants have defeated any right or interest of the plaintiff by becoming purchasers of the fee; secondly, that the defendants, as assignees of the interest of the covenantors of the lease of 1872, are only liable upon any covenant running with the interest covenantors had at the time of the lease, and not with any superior interest acquired under the deed of 1879; thirdly, that the *toties quoties* covenant for renewal cannot be strictly complied with.

As regards the first contention, it should be pointed out that there is no section in the Irish Church Act similar to the provisions contained in section 3 of the Episcopal and Capitular Estates (England) Act (14 & 15 Vict. c. 104). *Postlethwaite* v. *Lewthwaite* (3) was decided upon the special provisions in that section, expressly preserving rights of renewal in sub-lessees. No doubt, in the Irish Church Act, the rights of parties claiming under archbishops' or bishops' leases are preserved (see section 12, subsect. 3), but not of persons claiming under a lease from a cathedral corporation, as here. This is referred to and relied on by the Master of the Rolls in *Bernard* v. *Hungerford* (4), which is a direct case in point.

As regards the second contention, the defendants are assignees of the covenantors' interest; and having purchased the reversion in fee, are only liable on any covenant that ran with the land, but not on any covenant merely running with the covenantors' interest: *Coey* v. *Pascoe* (5). All the cases cited against us were cases between covenantor and covenantee. Where there is a covenant

(1) 11 L. R. Ir. 295.
(2) 3 Mer. 190.
(3) 2 J. & H. 237.
(4) [1902] 1 I. R. 89.
(5) [1899] 1 I. R. 125.

Barton, J. 1904.

M'SWEENEY v. DRAPES.

to renew in a lease and the fee is acquired by the covenantor, the covenant to renew does not bind the fee; it binds only the mesne reversion. *Muller* v. *Trafford* (1); *Kent* v. *Stoney* (2); *Brereton* v. *Tuohey* (3); *Randall* v. *Russell* (4). The commissioners from whom we purchased were under no equity to renew, and were not bound by any covenant. Therefore, in the absence of any statutory provision or any equitable right, the plaintiff can only rely on the contract itself; but that only binds us so long as the lease existed. *Lyttle* v. *Fox* (5) was decided on the terms of the covenant. Section 13 of Deasy's Act only applies to assignees of the lessor's estate.

As to the third point, it would be impossible now to comply with the condition as to renewal or to renew at all, or to make provision for the payment of the fines. The plaintiffs, upon the terms of the contract, cannot claim a grant in perpetuity which is sought here.

Chaytor, in reply :—

The covenant is for the covenantor, his executors, administrators, and assigns. Therefore, on the terms of the contract, and on the ground of equity, whatever they acquired that was to be assigned over to us. The actual words of the contract cannot be literally interpreted on the ground of equity. *Coey* v. *Pascoe* (6) and other cases of that kind are clearly distinguishable. In those cases there were three interests, viz.: the head landlord, middleman, and sub-lessees. If a stranger buys a different interest, he is not to be saddled with a covenant entered into by another who has not the same interest; but if the covenantor himself purchases such an interest, he is bound. *Muller* v. *Trafford* (7) was decided on the particular words of the covenant. The equitable doctrine is that where a person having a duty towards another acquires a larger interest, he is bound by it, and cannot derogate from the rights of the person to whom he owes such duty: *In re Biss*; *Biss* v. *Biss* (8); *Trumper* v. *Trumper* (9); Lewin on Trusts (10th ed.), p. 193. In

(1) [1901] 1 Ch. 54.
(2) 9 Ir. Ch. R. 249.
(3) 8 Ir. C. L. R. 190.
(4) 3 Mer. 190.
(5) [1898] 1 I. R. 340.
(6) [1899] 1 I. R. 125.
(7) [1901] 1 Ch. 54.
(8) [1903] 2 Ch. 40.
(9) L. R. 14 Eq. 295.

Randall v. *Russell* (1) the interest of the lessor was absolutely put an end to; but here the lessor's interest was not put an end to, but merely transferred. In *Bernard* v. *Hungerford* (2) the conduct of the sub-lessee in refusing to purchase destroyed any equity she had.

BARTON, J.:—

May 17.

The corporation of the Cathedral Church of St. Canice's, in the city of Kilkenny, being seised in fee of certain premises in that city, demised them by a lease, dated November 28, 1860, to Vernon R. Drapes for forty-one years from the 25th March, 1861, at the rent of £5 Irish. The lease contained no covenant for renewal; and there is no evidence of any customary right of renewal affecting it. In the year 1869 the Irish Church Act became law; and under its provisions the property of the Cathedral Corporation became vested in the Church Temporalities Commissioners, subject to the lease of 28th November, 1860.

The interest of Vernon R. Drapes, as lessee in that lease, appears to have been assigned in trust to three persons named Cumine, Robertson, and Ryan, who, by a sub-lease, dated March 20th, 1872, sub-demised the premises which are in question in this action to William Hayes (now represented by the plaintiff) for a term of twenty-nine years, from September 29th, 1871, at the rent of £20. The sub-lease contained a covenant, on the part of the lessors, their executors, administrators, and assigns, to make and execute to the lessee, his executors, administrators, and assigns, a like lease whenever and so often as the lessors, their executors, administrators, and assigns, should themselves get a renewal of their lease on payment to the lessors, their executors, administrators, and assigns, of any fines paid for such renewal, and that the said lease or leases should be for the same term or terms as the lessors, their executors, administrators, or assigns, should renew for, and at the same yearly rent as was payable under the present lease. Afterwards the interest of Vernon R. Drapes in the church lease of 1860 came to be vested by certain deeds of family arrangement in the defendants who, on the occasion of a

(1) 3 Mer. 190. (2) [1902] 1 I. R. 89.

Barton, J. 1904. M'SWEENEY v. DRAPES.

sale under section 34 of the Irish Church Act, 1869, purchased the fee-simple reversion of the premises in the church lease, which was assigned to them by the Commissioners of Church Temporalities in Ireland by a deed of August 7, 1879.

The sub-lease of March 20, 1872, expired on September 29, 1900. Thereupon the plaintiff, who represented the sub-lessee's interest in that sub-lease, put forward the claim which he now asserts; and instituted the present action seeking to have it declared that the fee-simple purchased by the defendants is bound by the covenant for renewal contained in the sub-lease, and that the defendants should, upon payment of a due proportion of the consideration and expenses of the purchase, be ordered to execute to plaintiff a grant in perpetuity of the premises granted by the sub-lease of March 20, 1872.

I wish at the outset to point out that there is not, in this case, any suggestion of fraud on the part of the defendants. They did not take any unfair advantage of the plaintiff. They did not go behind his back to intercept any right of his. They do not appear to have themselves had any right by contract or custom to get a renewal of the head-lease; and if they had not purchased the fee-simple, the plaintiff might never have become entitled to a renewal of the sub-lease under the covenant, because defendants themselves might never have got a renewal of the head-lease. All that defendants did was to avail themselves, on the occasion of the sale of the property by the Church Temporalities Commissioners, of the right of pre-emption conferred upon them by section 34 of the Irish Church Act, 1869. The existence of that statutory right of pre-emption was presumably known to the parties to the sub-lease, when that sub-lease was executed in 1872. It might have been made the subject of a special covenant or stipulation; but plaintiff's predecessor in title did not ask for any such stipulation. The Master of the Rolls in *Bernard* v. *Hungerford* (1) referred to a similar sale under the Church Act made by some persons named Barter in the following terms :—" But here the purchase of the fee is not the voluntary or spontaneous Act of the Barters. It is really the result of the Church Act, which in a manner forced it

(1) [1902] 1 I. R. 89, 97.

upon them." I cannot help inferring from several passages in his judgment that the Master of the Rolls—although it was not necessary for him to decide the point directly—was of opinion that the mere fact of a purchase of the reversion by a middleman under the Irish Church Act did not necessarily raise any such equity in favour of a sub-lessee with a *toties quoties* covenant for renewal as is claimed by the plaintiff in this case.

In the next place I wish to point out that the defendants, when they purchased the reversion, did not stand in any fiduciary or quasi-fiduciary relation towards the plaintiff, and did not owe to the plaintiff any duty outside of the obligation defined by the covenant in the sub-lease. Plaintiff's counsel cited a number of authorities which seem to me to have no real bearing upon the present case. This is, after all, little more than a plain unvarnished action, between the assignees of the lessee's and lessor's interests respectively in a sub-lease, founded upon the contract between the parties to the sub-lease. Quotations from judgments in *Randall* v. *Russell* (1); *Gabbett* v. *Lawder* (2); *Trumper* v. *Trumper* (3); *Leigh* v. *Burnett* (4), and other cases of that description, which were referred to in the course of the arguments, are of very little assistance here. It is true that in cases of that class the defendant was usually a person who had, in respect of a former lease, obtained for himself a renewal, or acquired a reversion. But the question in those cases was not concerned with a lessor's obligations to his lessee under the covenants in a sub-lease. The ground of action in those cases was, speaking generally, to the effect that the defendant availed himself of a fiduciary or quasi-fiduciary position to purchase or acquire for himself trust property, or property in respect of which he owed some duty to the plaintiff. Cases frequently come before a Court of Equity where it is charged that the person, who has acquired a renewal or reversion, occupied at the time of such acquisition a position of trust or duty towards others in respect of the property in question. For example, he may have occupied the position of an executor, or administrator, or trustee; or of an agent, or of a partner, or of a mortgagor, or mortgagee; or of a tenant for life, bound by the trusts of a will or settlement. If in

(1) 3 Mer. 190.
(2) 11 L. R. Ir. 295.
(3) L. R. 14 Eq. 295.
(4) 29 Ch. D. 231.

Barton, J. 1904. M'SWEENEY *v.* DRAPES.

such cases there is established the existence of a fiduciary relation or other binding duty towards the plaintiff, the Court will treat the new interest, which the defendant has acquired, as a graft upon the old interest. Those cases do not turn upon the effect or construction of the contract between a middleman and a sub-lessee *inter se*. They come under what is practically a separate branch of equity jurisdiction dealing with constructive trusts, as to which, ever since 1721, the Romford Market case, *Keech* v. *Sandford* (1), has been the leading authority. For a modern discussion and classification of other cases of that kind, reference may, in future, be always usefully made to the judgments of Collins, M.R., and Romer, L.J., in the recent case of *In re Biss* (2). But the present case is far removed, or, at all events, is in principle quite distinguishable, from cases of that kind. Here it cannot be suggested that any fiduciary relation existed between the parties, or that any duty was owed by the defendants to the plaintiff, save in so far as it was defined, or arose out of the provisions of the sub-lease itself.

It is, I think, quite clear that, so far as the contract between the parties is concerned, the plaintiff's claim does not come within the terms and language of his covenant. It follows that *Lyttle* v. *Fox* (3) is distinguishable from the present case. In *Lyttle* v. *Fox* (3) the Court of Appeal held that a lease, which a person named Tennant acquired, was "a new lease for an extended term" within the meaning of the covenant which the Court had to construe; and that the defendants who represented Tennant were bound, *upon the literal construction of the covenant,* to execute a further lease to plaintiff. A defendant cannot evade the strict terms of his covenant when he finds it burdensome and inconvenient to carry them out, or advantageous not to do so. For example, in *Evans* v. *Walsh* (4), a middleman tried to escape the obligation of a covenant in a sub-lease because, by the action of his head landlord, his head rent had been largely increased, and the obligation of the covenant had, under the altered circumstances, become more burdensome than he had anticipated when he made the sub-lease; but Lord Redesdale held him to the strict terms of his covenant. Cases of

(1) 1 W. & T. L. (6th ed.), 153.
(2) [1903] 2 Ch. 40.
(3) [1898] 1 I. R. 340.
(4) 2 Sch. & Lef. 519.

that kind have no bearing upon the present case. In the present case it cannot be seriously contended that upon a literal or even a liberal construction of the sub-lease, the purchase of the fee-simple under the Church Act comes within the event contemplated by the covenant, namely, the getting a renewal of the head lease of the premises; or that the execution of a conveyance to plaintiff of a grant in perpetuity corresponds in any sense to the obligation by which this covenant bound this middleman.

Where is the plaintiff's equity to be found, in the absence of fraud or fiduciary relation, or binding duty, or contractual right, in a case like the present one? I agree that Courts of Equity should be vigilant in these cases, and I apprehend that whenever a lessor, who is bound to his lessee by a *toties quoties* covenant of renewal, acquires the fee-simple, a question may arise whether or not he is bound in equity to perform substantially his covenant out of the acquired interest. In considering that question, it is well to bear in mind the guarded observations of Holmes, L.J., at the end of his judgment in *Lyttle* v. *Fox* (1), at p. 365 :—"I am not prepared to say that a covenant for *toties quoties* renewal by itself, and without anything more, makes the covenantor a trustee for the covenantee; and if in this case the interest purchased by Tennant had not been a new lease for an extended term within the meaning of the covenant, I would require to consider carefully authorities, which do not always harmonise, before I could hold that Tennant was bound to give his lessee the benefit of such purchase, or to share the purchased interest with him." The present case seems to raise a question very like that which was alluded to in this passage—namely, whether a covenant in a sub-lease for *toties quoties* renewal by itself, and without anything more, makes an assignee from the covenantor, if he purchase the reversion under the Irish Church Act, a trustee for the covenantee. I have not been able to find any case in which the mere fact of the purchase of the fee-simple, under circumstances such as exist in the present case, has been held to fasten upon the purchaser, or upon the purchased estate, such a trust or obligation as the plaintiff claims the benefit of. The comparatively slender and

(1) [1898] 1 I. R. 340.

Barton, J. 1904. M'SWEENEY v. DRAPES.

easy change or transition involved in the conversion of a lease for lives renewable for ever into a fee-farm grant, or the substitution of the latter for the former, which was the point alluded to by Cusack Smith, M.R., in *Pilkington* v. *Gore* (1), can hardly be regarded as a case directly in point.

It seems to me that plaintiff's claim has been based mainly upon a misunderstanding and misapplication of *Postlethwaite* v. *Lewthwaite* (2). Indeed the relief for which plaintiff asks appears to have been to some extent borrowed from the proceedings and from the decree in that case. That case deserves to be very carefully scrutinised. I have observed that it is sometimes cited as an authority for a wider proposition than it decided. It turned upon the special provisions of an English statute, under which the plaintiff was admittedly entitled to relief; and the only question in the case was upon what terms relief was to be given. A careful consideration of that case will, I think, make it clear that it is quite distinguishable from the present one, and really has no bearing upon it. In *Postlethwaite* v. *Lewthwaite* (2) the defendant had purchased the reversion from the Ecclesiastical Commissioners in England. The sale was subject to the statutory provisions contained in section 3 of the Episcopal and Capitular Estates (England) Act, 1851 (14 & 15 Vict. c. 104). That section played a very prominent part in the case, and it is important to bear in mind that there is no such statutory provision applicable to the case before me. The 3rd section of the English statute, upon which *Postlethwaite* v. *Lewthwaite* (2) mainly turned, provided that the interest acquired by a lessee should be deemed in equity to be acquired in respect of his interest under the lease, and should be subject to the same trusts, charges, encumbrances, as a renewed lease would be. The section went on to say that all covenants which would have entitled any sub-lessees or others to derivative interests upon renewals upon contribution to fines and other payments on renewal should give the like rights so far as the nature of the property should admit, and proportional shares and benefits out of any interest acquired under the Act by the lessee, upon a proportionate contribution to the costs or consideration paid or

(1) 8 Ir. Ch. R. 589, 596. (2) 2 J. & H. 237.

given for the interest acquired by such lessee. The defendants in that case did not dispute their liability under this section. They offered, immediately after the filing of the bill, to convey the reversion to plaintiff. The contention on behalf of the defendants was summed up in the following sentence in the argument of counsel (p. 243) :—"All the right he (plaintiff) has is that given by the 3rd section of the Act which has been cited, and that we were always willing to give." Accordingly, the case was one in which the defendants did not, and having regard to section 3 of the English statute, could not dispute plaintiff's right to a conveyance of the reversion. The question in the case was only as to the kind of relief to which plaintiff was entitled, *i.e.* whether the defendants should convey the reversion under section 3 of the statute, as they had offered to do, or grant a perpetuity renewal at the same fine as before, which was the form of relief which plaintiff claimed. Lord Hatherley in his judgment said (at p. 245), in speaking of the sales to defendants from the Ecclesiastical Commissioners :—"That sale, of course, would be subject to the statutory provision." In reading and applying his judgment to any other case, these statutory provisions contained in the English Act of 1851 should not be left out of mind.

Now I turn from *Postlethwaite* v. *Lewthwaite* (1) to the present case. The 34th section of the Irish Act provides that a person purchasing from the Commissioners shall hold the lands purchased by him subject to all tenant's rights of renewal to which the same were subject in the hands of the Commissioners at the time of such sale. That provision does not help this sub-lessee. There are other provisions in the Irish Church Act preserving certain rights of renewal ; but no provision applicable to the sale in the present case, such as is contained in sect. 3 of the English statute, is to be found in the Irish Act. The case would be wholly different if there was in the Irish Act a section, similar to that with which *Postlethwaite* v. *Lewthwaite* (1) was concerned, to the effect that a reversion of this kind, when purchased under the Act, was in equity to be bound by the same obligations as a renewed lease would be, and that sub-lessees were to have the like rights, so far as the

(1) 2 J. & H. 237.

Barton, J. 1904.

M'Sweeney v. Drapes.

nature of the purchased estate admitted, as they would have had under the covenants, if the lease had been renewed. It seems to me that the absence of such a provision in the Irish Act is not without significance. The plaintiff appears to be asking the Court to read into the Irish Church Act an elaborate provision making the defendant a trustee for him, the absence of which from the Irish Act is rendered the more conspicuous by the fact that it was present in an English statute of similar purport.

Another branch of Mr. Fetherstonhaugh's able argument was founded upon cases like *Brereton* v. *Tuohey* (1); *Kent* v. *Stoney* (2); *Coey* v. *Pascoe* (3); and *Muller* v. *Trafford* (4). Mr. Fetherstonhaugh pointed out that this is not a case arising between the original covenantor and covenantee, and that the claim is not founded upon a personal liability under the covenant, but upon a liability under a covenant which ran with and was annexed to the land. The covenant is one, it is true, which ran with the estate in the land; but that estate was a limited estate. After the expiry of the sub-lease the covenant would bind the reversion which was vested in the covenantor at the time he entered into the covenant, that is to say, the mesne reversion; but how could a Court of Equity fasten the obligations of the covenant upon the larger reversion in fee? The covenant was with the lessor "and his assigns"; but that meant the assigns of the lessor's estate. Section 13 of Deasy's Act similarly applies to the assigns of the particular estate of the lessor. I did not hear any sufficient answer to this branch of Mr. Fetherstonhaugh's argument.

As no fraud or unfair dealing has been charged against the defendants in respect of the purchase of the reversion under the Irish Church Act, and as they occupied no fiduciary or quasi-fiduciary position towards the plaintiff, and owed to him no duty save as defined by this covenant, I am at a loss to see under what branch of equitable relief the plaintiff has succeeded in bringing his case. Other considerations might have been imported into the case if this had not been a purchase under these provisions of the Irish Church Act, or if the parties had been the original covenantor and covenantee. I am not called upon to express an opinion upon

(1) 8 Ir. C. L. R. 190.
(2) 9 Ir. Ch. R. 249.
(3) [1899] 1 I. R. 125.
(4) [1901] 1 Ch. 54.

Barton, J.
1904.
M'SWEENEY
v.
DRAPES.

supposed cases of that kind which are not before me. Suffice it to say that I have not been referred to any authority for the relief claimed in the present case. If the plaintiff has failed to bring himself under any branch of equitable relief, he certainly cannot succeed upon his covenant or upon the statute. The covenant admittedly has not been broken; its obligation has not arisen. There is nothing in the Irish Church Act conferring any right upon the plaintiff; on the contrary, the Legislature has, in this respect, pointedly passed him by. The plaintiff is asking the Court to read into his sub-lease a covenant which it did not contain, or into the statute a provision which Parliament refrained from inserting, or to find and apply for his benefit some new rule of equity as yet unsupported by authority. In my opinion he has failed to establish his right to the relief which he claims, and I must dismiss the action with costs.

J. MAC M.

Appeal.
Dec. 14, 15.

The plaintiff appealed to the Court of Appeal, FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Molony, K.C., and *Chaytor*, for the appellant.

Fetherstonhaugh, K.C., and *G. W. Walker*, for the respondents.

The arguments were the same as those reported in the Court below.

1905.
Jan. 20.

WALKER, L.J., delivered the judgment of the Court:—

The premises with which this action is conversant consist of a plot containing 2 roods and 21 perches situate within the corporation of Irishtown, in the city of Kilkenny. These premises were before the passing of the Irish Church Act, 1869, part of the fee-simple property of the corporation of the Cathedral Church of St. Canice, in the diocese of Ossory, from which church, or the saint who founded it, the city of Kilkenny derives its name.

It will be necessary for me hereafter to enter more fully into

Appeal. 1905. M'SWEENEY v DRAPES. Walker, L.J.

the title; but I may here mention, for the purpose of illustrating the question we have to decide, that the Cathedral Church Corporation, on 28th November, 1860, made a lease of the premises to the Rev. Vernon R. Drapes for a term of forty-one years, from the 25th March, 1861, at the yearly rent of £5 Irish. This lease contains no covenant for renewal, and on the 20th March, 1874, three gentlemen named Cumine, Robertson, and Ryan, trustees of a deed of 2nd April, 1863, made a sub-lease of the same premises to one William Hayes, whose interest the plaintiff in the action now represents, for a term of twenty-nine years from the 29th September, 1871, at the yearly rent of £20; and this lease contains a covenant by the lessors with the lessee that they "their executors, administrators, and assigns, shall and will make, grant, and execute to him, the said William Hayes, his executors, administrators, or assigns, a like lease as this present demise, whenever, and as often as, they, the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, shall themselves get a renewal of said premises, on the request, costs, and charges of the said William Hayes, his executors, administrators, or assigns, and on payment by him or them to the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, of such fine as they, the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns, shall have paid for such renewal, first having deducted therefrom the sum of 5*s.* sterling for each year granted over and above the term in the present indenture of lease then unexpired, and the said lease or leases shall be for the same term or terms as the said James Cumine, James George Robertson, and John Ryan, their executors, administrators, or assigns shall renew for, and at the same yearly rent as payable by the present indenture of lease."

This sub-lease expired on the 29th September, 1900. The lease of the 28th November, 1860, would not expire till the 25th March, 1902. The Irish Church Act, 1869, had meantime passed, and under it all the property of the corporation of the Cathedral Church of St. Canice became vested in the Church Temporalities Commissioners, subject, as to the property to which this action relates, to the lease of 28th November, 1860.

The defendants, who had, under certain deeds of family arrangement which I shall hereafter notice, become entitled, as trustees, to the interest of the Rev. Vernon R. Drapes, purchased, under the provisions of the Church Act, the premises in the lease of 28th November, 1860, and the Church Temporalities Commissioners, by a conveyance, dated 7th August, 1879, made with the consent of the Rev. Vernon R. Drapes, and in consideration of the sum of £160, conveyed the premises to them in fee, subject to the then unexpired lease of 1860.

The present action has been brought on 13th March, 1903, after the expiration of the mesne lease, by the plaintiff as representing the sub-lease of 20th March, 1872, and it prays a declaration that the fee-simple purchased by the defendants is bound by the covenant for renewal contained in that sub-lease, and that the defendants are bound to execute to the plaintiff a conveyance of those premises upon payment of a due proportion of the consideration and expenses of purchase, for the ascertainment of which an inquiry is sought; and it asks that upon payment of the sums so ascertained the defendants be ordered to execute to the plaintiff a grant in perpetuity of the premises comprised in the lease of 20th March, 1872.

Mr. Justice Barton has dismissed the plaintiff's action, and the correctness of his judgment is the question involved in the appeal.

It is obvious that even if the defendants were in the same position as Cumine, Robertson, and Ryan, who made the lease of 1872, and gave the covenant to renew, which I have read, the defendants have never obtained a renewal from the cathedral church of St. Canice or the Church Temporalities Commissioners, and therefore that they are not within the terms of the covenant to renew; but it is contended that as they bought the reversion in fee, that fee is bound by the covenant for renewal, and that they are bound to serve the covenant out of it.

It will, I think, go far to determine that question if we ascertain the rights between the corporation of the cathedral church, the lessors in the lease of 28th November, 1860, and the lessees under that lease.

There is nothing to show that Vernon R. Drapes, or his

Appeal. 1905. M'SWEENEY v. DRAPES. Walker, L.J.

assignees, had, during the currency of the lease, or upon its expiration, any right to claim a renewal from the corporation of the cathedral church. We have no evidence as to the constitution of that church corporation, save that it was a corporation aggregate, which owned those premises in fee, and made leases by its treasurer for the time being for forty-one years. It was clearly not bound to renew by contract, and there is no evidence of a custom to renew. The only step in that direction is that it is stated in a recital in a deed of 4th May, 1878, that the lease of 28th November, 1860, was a renewal of one for a similar term made on the 27th March, 1833, by the cathedral church to John Robertson; but that created no right, and it must be remembered that a corporation aggregate is not in the same position towards its lessees as a corporation sole, such as a bishop or archbishop who had an interest in running their lives against the leases, and they were not within either the spirit or the language of the legislation contained in the Church Temporalities Acts, 3 & 4 Wm. 4, c. 37, and the several Acts down to 23 & 24 Vict. c. 150, amending them. So far as appears from the evidence in this case the corporation of the cathedral church was in the same position as regards its tenants as any ordinary owner in fee, and there was no right or custom to obtain a renewal which could be asserted against it either in law or equity; and if this be so, the lands of the corporation of the cathedral church were not subject, in the hands of the Church Temporalities Commissioners, to any right of renewal on the 7th August, 1879; and therefore the last clause in the 34th section of the Church Act, upon which a good deal of discussion took place during the argument, has no application in the plaintiff's favour.

It could not have been intended to create a new and different right in the tenants of the commissioners. It only requires to read the 12th, 31st, and 34th sections of the Church Act to see how thoroughly the framer of that Act understood the position of archbishops and bishops and ecclesiastical commissioners in reference to leases of Church property, and framed the Act with reference to that position, leaving that of such corporation aggregate as the cathedral church of St. Canice untouched.

The remaining question is whether the fact that the mesne lessor had given a covenant to renew, if he himself obtained a renewal, and the fact that his assignee of the mesne reversion bought the fee under the provisions of the Church Act, imposed on such purchasing assignee an obligation to serve the covenant out of the fee in the manner prayed in the statement of claim.

It will be observed that the defendants were not in any fiduciary relation towards the plaintiff, which entirely distinguishes this case from *Gabbett* v. *Lawder* (1), nor were they themselves the covenantors, which possibly might make a difference, at least where the purchase was not a quasi-compulsory one under the Church Act. What does appear by the deed is that Cumine, Robertson, and Ryan, who made the lease of 20th March, 1872, were assignees in trust of Vernon R. Drapes, the lessee in the lease of 28th November, 1860, and that the defendants, by virtue of two subsequent assignments of 4th May, 1878, and 11th May, 1878, became assignees of those lessors, but holding on certain family trusts created by this last deed of 11th May, 1878. The covenant as against them could only continue during their estate.

The plaintiff relied principally on three cases—*Evans* v. *Walsh* (2); *Pilkington* v. *Gore* (3); and *Postlethwaite* v. *Lewthwaite* (4).

Evans v. *Walsh* (2) was a case between covenantor and covenantee. The defendant was a member of the corporation to whom leases had been made and renewed on favourable terms, and he covenanted to renew to plaintiff at same rent. The corporation, finding they were unduly favouring one of their own body, and committing a breach of trust, required the lease to be publicly advertised for, and the defendant got a renewal by bidding at an auction, but at a much increased rent, and he refused to renew in the terms of his covenant. Lord Redesdale decided that if he thought fit to retain the benefit of the renewal he had got, he was bound to comply with his covenant, which fitted the case. There there was a renewal. In *Pilkington* v. *Gore* (3) a lessor held for lives renewable for ever, and in 1695 he made a sub-lease

(1) 11 L. R. Ir. 295.
(2) 2 Sch. & L. 519.
(3) 8 Ir. Ch. R. 589.
(4) 2 J. & H. 237.

Appeal. 1905. M'SWEENEY v. DRAPES. Walker, L.J.

for ninety-nine years, with a *toties quoties* covenant, and in 1721 he obtained a fee-farm grant, but till 1811 renewals were granted from time to time according to the covenant. In 1811 new covenants for renewal were introduced. The form of the covenant in the lease of 1695 being inapplicable, having regard to the fee-farm grant, it was held that the lessee was entitled to enforce a fee-farm grant from this fee-farm grantee. This seems a plain case, having regard to the acts of the parties.

As regards *Postlethwaite* v. *Lewthwaite* (1), I think that Mr. Justice Barton is right in saying that the Act of Parliament, 14 & 15 Vict. c. 104, was the governing factor, and the defendant there offered to give the plaintiff all that he was entitled to under the statute, viz. a conveyance of the reversion in his part on proper terms.

The respondents, on the other hand, have referred to several cases which in principle cannot be distinguished from the present. In *Kent* v. *Stoney* (2) one William Hill was owner of two leaseholds, one held for lives renewable for ever, and the other for two lives not renewable, and he sub-demised both by one lease in 1788 to Kent, giving a covenant for perpetual renewal. The reversion became vested by assignment in one Stoney, who put the lands in settlement. The last life in the terminable lease dropped in 1808. A fee-farm grant was made as if under the Renewable Leasehold Conversion Act, by Ralph Stoney, a tenant for life, which included both leaseholds, and his son brought an ejectment on the title which led to the litigation. Robert Johnston, the owner in fee, had devised the reversion in fee to Thomas Stoney, and the cause of petition in *Kent* v. *Stoney* (2) was brought to enforce a renewal under the covenant in the lease of 1788, which it was contended should be served out of the fee. The Master of the Rolls dismissed the action. He saves the question whether, if William Hill, the covenantor, had acquired the fee, he might not have been bound; but as regards Stoney, the case was wholly different. At law the covenant was put an end to by the merger, and there was no equity, as the terminable lease had expired. He says:—"I am quite unable to understand how a person bound by

(1) 2 J. & H. 237. (2) 9 Ir. Ch. R. 249.

a covenant merely by reason of its running with a mesne reversion, and under no personal liability whatever, is to have an estate in fee which he may have purchased, and for which he may have paid the full value, affected by a covenant to which the fee was not liable in the hands of the vendor."

I have pointed out that the corporation of the cathedral church was under no liability.

The principle of the decision in *Kent* v. *Stoney* (1) was applied by the present Master of the Rolls in two cases; and though each of them, perhaps, contained another sufficient ground for the decision, he has clearly shown what his decision would be in a case like the present.

In *Coey* v. *Pascoe* (2) Robert Getty acquired by assignment the leasehold reversion of two sub-leases which contained a covenant for renewal. Lord Donegal, the owner in fee, who was under no obligation to renew, made a fee-farm grant of the lands which Robert Getty bought in 1853. The opinion of the Master of the Rolls on the legal question, in which I concur, is clearly expressed. Robert Getty's obligation was by virtue of his being assignee, not by virtue of contract, and when he bought the fee-farm interest in 1853, he came under no liability which did not previously bind the fee, and there was no obligation on the fee, just as there was none in the present case.

The case of *Bernard* v. *Hungerford* (3), before the same Judge, more closely resembles the present to this extent, that the purchase of the fee was made under the Church Act, and the object of the action by a sub-lessee with a *toties quoties* covenant for renewal was to have the fee made liable to serve the covenant.

The head lease there, dated 2nd July, 1784, was made by the Dean of Cork, of church lands, for twenty-one years. There was no covenant to renew; but it was, in fact, renewed from time to time, the last renewal being dated 15th February, 1871, to persons named Barter. The sub-lease, dated 1st April, 1793, was made to the predecessor in title of the plaintiff, and there was a *toties quoties* covenant to renew for the term obtained, save one year at a peppercorn rent, and without fine. The last renewal was in 1833.

(1) 9 Ir. Ch. R. 249. (2) [1899] 1 I. R. 125. (3) [1902] 1 I. R. 89.

Appeal. 1905. M'SWEENEY v. DRAPES. Walker, L.J.

After the passing of the Church Act the Barters were offered the option of purchase, and they applied to the plaintiff to contribute to the expense; but she declined, and the Barters obtained a conveyance of the fee, paying and securing a substantial purchase-money. The Master of the Rolls was of opinion that the refusal of the plaintiff to contribute deprived her of all equity, but he shows plainly that he was also of opinion that, apart from this circumstance, the purchase of the fee conferred no right to have the covenant served out of it. He points out that there was no fiduciary relation, that the dean had been under no obligation to renew, and the purchase was forced upon the Barters as the result of the Church Act, and he refers to that statute in words which apply to this case:—"In the present instance the statute which provides for the preservation of the interest of certain classes of sub-tenants, in a particular way, and within definite limits of time, makes no provision for the class of sub-tenants of which the plaintiff is one, and draws no distinction in section 34 between the effect of a purchase by one who has a right of pre-emption, and one by a member of the public, when once the sale is completed."

I concur in the view of the Master of the Rolls as to the effect of the Church Act; I think that the plaintiff has failed to show any equitable right to the relief he claims.

The judgment of Mr. Justice Barton was, in my opinion, right, and the appeal must be dismissed with costs.

Solicitor for the plaintiff: *Michael Buggy.*
Solicitor for the defendants: *Purefoy Poe.*

G. Y. D.

IN THE MATTER OF THE ESTATE OF MAXWELL CLOSE.

Meredith, J.
1904.
Dec. 12–15.
1905.
Jan. 13.

Landlord and tenant—Land Purchase Acts—Redemption of superior interests—Date at which value is to be ascertained—Variable rent—Circumstances to be considered.

C. sold to his tenants his estate, which was held under a perpetuity grant from Trinity College, Dublin, subject to a rent of £1836, for £52,423. Under the provisions of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851, this rent was variable every ten years, in accordance with a scale of prices laid down in the Act; but at the time of the sale there was no present probability of a variation. After payment of outgoings C. had had a profit rent of £117. The tenants' rents were practically second term judicial rents. C. applied to have the redemption price of the perpetuity rent fixed. Evidence was adduced as to the market value of head rents:—

Held, applying the principles laid down in *In re Leader's Estate* ([1904] 1 I. R. 368) and *In re Kemmis' Estate* ([1904] 1 I. R. 496), and taking into consideration all the circumstances of the case—including (*a*) the fact that the rental was a second term rental; (*b*) the poor law valuation; (*c*) the price which C. obtained from his tenants; (*d*) the evidence as to the sale of agricultural rents in Ireland; (*e*) the value of money; (*f*) the fact that the redemption was compulsory; (*g*) the liability of the rent to variation; and (*h*) the fact that non-payment of the rent would have resulted in a gain to Trinity College, Dublin, through the eviction of C.—that the redemption price should be fixed at £45,000.

Held, further, that (*h*) was not to be made the measure of the compensation.

Held, further, that the fact that Trinity College, Dublin, must utilize the redemption money as an income-producing fund was not a special circumstance to be taken into consideration.

Held, further, that the existence of the indemnity grant to Trinity College, Dublin, under section 39 of the Irish Land Act, 1903, did not diminish the redemption price which Trinity College, Dublin, was entitled to.

Held, further, that the value should be ascertained as at the date of the order attaching claims to the purchase-money, under section 24 (1).

MOTION on behalf of the vendor for an order that the yearly perpetuity rent of £1551 1*s.* 1*d.*, reserved by a grant in perpetuity, dated 31st October, 1855, and made between the Provost, Fellows, and Scholars of the College of the Holy and Undivided

Meredith, J. 1904. *In re* Close's Estate.

Trinity, of Queen Elizabeth, near Dublin, of the one part, and Maxwell Close of the other part (which said rent was in pursuance of the reservation in that behalf contained in the said grant in perpetuity, and, under the provisions of the Trinity College Leasing and Perpetuity Act of 1851, subsequently increased to the yearly sum of £1836 16*s.* 7*d.*), and the exceptions and reservations, and other superior interests, reserved by the said grant in perpetuity, other than the exclusive right of mining and taking minerals, and digging and searching for the same, be redeemed, and for an order determining the redemption price thereof.

The lands were held by the vendor under a grant in perpetuity, dated 31st October, 1855, under the provisions of the Trinity College Leasing and Perpetuity Act, 1851, made between the Provost, Fellows, and Scholars of the College of the Holy and Undivided Trinity, of Queen Elizabeth, near Dublin, of the one part, and Colonel Maxwell Close, the grandfather and predecessor in title of the vendor, of the other part, whereby the Provost, Fellows, and Scholars of the said College granted to Maxwell Close, his heirs and assigns, that portion of the lands for sale in this matter known as the Brootally estate, containing 3249A. 2R. 16P. statute measure, to hold to Maxwell Close, his heirs and assigns, for ever at the yearly rent of £1551 1*s.* 1*d.*, or at such increased, diminished, or revised yearly rent or sum as should from time to time hereafter be substituted for the said reserved rent, in pursuance of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851, payable on the 1st May and 1st November.

It appeared by a recital in the grant of 1855 that the rent of £1551 1*s.* 1*d.* included the sum of £122 10*s.* 7*d.*, the amount of rentcharge in lieu of tithe payable by Trinity College out of the lands.

By section 12 of the Act it is provided that it should be lawful for the College or the grantee, during the continuance of the estate conveyed by such grant, to require each of the other, by notice in writing, at any time within twelve calendar months next after the expiration of ten years, to be computed from the 1st May next preceding the execution of such grant, to have the average prices of certain commodities, respectively, for the said period of

ten years inquired of and ascertained, as provided by sect. 14, and then the amount of such annual rent should be increased or diminished by the College in such manner and to such extent, that each component part (according to the proportion mentioned in section 11) of such rent to be payable during the next succeeding ten years, should bear the right proportion to the same component part of such rent reserved out of the lands in the original grant, as the average price of the commodity representing and regulating such component part of the rent should bear to the standard price of the same commodity set forth in schedule B to the Act, as set forth in the example mentioned in the schedule; and so in like manner at each subsequent period of ten years the rent to be payable for the next ensuing ten years was to be ascertained; and that a certificate should thereupon be executed by the College, setting forth the amount of such reserved or new annual rent; and such revised annual rent should be payable for a period of ten years, commencing from the 1st May before the application for a revision. It was provided that if upon any such revision the differences of prices so ascertained should not be such as to cause an increase or diminution equal to at least one-tenth of the rent (exclusive of rentcharge and interest, if any, on unpaid fines) then payable under such grant, no variation should be made in the rent payable for the next succeeding ten years.

By section 11 the rent was to be ascertained by the prices of the following commodities, and in the following proportion:—oats should be taken to represent five-eleventh parts of the rent; wheat and mutton, one-eleventh part each; and beef and butter two-eleventh parts each. Sect. 14 provided for the ascertainment of the average prices, from official returns if any; and where there were no official returns of prices, by arbitrators, who were to ascertain the average prices of the several commodities in not less than the ten principal towns in Ireland, or those containing the greatest population; and the average prices in such towns were to be taken as the average prices of the commodities for the purpose of the Act.

By a certificate, dated 21st April, 1866, it was certified that the rent to be payable from the 1st May, 1865, should, until the same should be again increased or diminished under the provisions of the

Meredith, J. 1904.

In re Close's Estate.

Act, be the sum of £1836 16*s.* 7*d.*, being the sum of £1714 6*s.* for rent, and £122 10*s.* 7*d.*, tithe rentcharge.

That rent had not been varied since. It was stated, in an affidavit of the vendor, that the average prices for the present period would only justify an increase of 13 per cent. on the rent reserved in the grant of 31st October, 1855 (the increase in 1865 having been 20 per cent.), and so, as the difference in prices would not cause a diminution of 10 per cent., no variation could take place at present. The vendor sold his estate to the tenants for the sum of £52,423. The rental was practically a second term rental.

The purchase-money was paid into the Bank of Ireland, and the order attaching claims pursuant to section 24 (1) of the Irish Land Act, 1903, was made, on the 4th of August, 1904. The vendor, in his affidavit, stated the facts and figures of the estate and purchase-money, which are referred to in detail in the judgment.

On behalf of the vendor an affidavit by Mr. Frank L. North was filed, paragraph 2 of which is referred to in full in the judgment. In paragraph 3 he stated that the result of his experience was that buyers who invest their money in head-rents look for a return of at least 4 per cent., that is, twenty-five years' purchase; and to obtain that rate of purchase it was necessary that there should be a margin of at least two or three times the amount of the rent; and that when the margin was less, the price obtained fell in proportion; and that it was only in very exceptional cases where the security was very ample, or where the purchaser bought for sentimental reasons, that more than twenty-five years' purchase was given. In the schedule to his affidavit he set out the particulars of several head-rents sold by him by auction during the preceding five years. On behalf of the vendor an affidavit of Maurice Dinneen was filed referring to head-rents sold in the estate of Thomas Connolly and the estate of Townsend Mundy; also an affidavit of Mr. Henry J. Synnott, solicitor, referring to the estate of Mr. Henry Bruce Armstrong, also held under a perpetuity grant from Trinity College, in which estate the redemption price of £190, an apportioned part of a rent of £1121, was fixed by Mr. Justice Meredith at £4000, and an

affidavit by Mr. M. C. O'Meara, setting out that a fee-farm rent of £75 6*s.* was, in November, 1904, sold by public auction for £1730, and 5 per cent. auctioneer's fees.

On behalf of Trinity College affidavits by, amongst others, Mr. Joseph Hume Dudgeon and Mr. William M. Battersby were filed. Mr. Dudgeon, in the schedule to his affidavit, referred to the amount of purchase-money which would be required to produce, in trustee securities, the College rental of £1836 16*s.* 7*d.*, and stated that a careful investor could not at present expect to obtain more than 3½ per cent., while trustees could not expect more than £3 6*s.* 8*d.* Mr. Battersby, in addition to the evidence set out in full in the judgment, stated that, for the reason therein mentioned, he was of opinion that a fair market for head-rents, charged on agricultural lands, had ceased to exist in Ireland; and that if such head-rents were offered for sale by public auction, their true value would not be realised.

Matheson, K.C., S. L. Brown, K.C., and *Chaytor*, for the vendor:—

The redemption price of this head-rent must be fixed under the rules laid down by the Court of Appeal in *In re Leader's Estate* (1), and *Kemmis' Estate, No.* 1 (2), and *Kemmis' Estate, No.* 2 (3). The fair market value is one of the circumstances to be considered; many cases of market value are mentioned in the affidavits filed on behalf of the vendor. In those cases the margin of security was substantial; here it is only £117. We rely on the redemption price fixed in this Court in the Armstrong estate, also held under a lease at a variable rent from Trinity College, which was fixed at something over twenty years' purchase. There is no difference between the security and the circumstances in that case and the present; and the estates are contiguous.

Section 16 (1) of the Irish Land Act, 1903, shows the claim of the owner of the superior interest against the land is transferred to the purchase-money. This is similar to the provisions in sect. 9 (5) of the Purchase of Land (Ireland) Act, 1885, where it was provided that the purchase-money should "for all purposes as regards the right or claim of any person to or against the estate

(1) [1904] 1 I. R. 368. (2) [1904] 1 I. R. 496. (3) 38 I. L. T. R. 241.

Meredith, J. 1904. *In re* Close's Estate.

sold represent such estate"; this was continued in sects. 14 and 15 of the Land Law (Ireland) Act, 1887, and sect. 31 of the Land Law (Ireland) Act, 1896. By the order of the Court of Appeal in *In re Leader's Estate* (1) it is specifically laid down that the amount of the redemption price "ought not to be affected by the consideration of indemnifying the owner of the said rent against loss of income by reason of the difference between the annual amount of the said rent and the annual income of any investment or class of investments in which the redemption price might be invested." The Legislature have intimated, by the provision in sect. 39 to supplement the income of the redemption price, that without such provision there would be a loss of income; that is a statutory declaration that the owner of the superior interest cannot expect to have his income kept up on redemption. There can, admittedly, be no immediate variation in the rent in favour of Trinity College; but the liability to variation, and the possibility, at least, of diminution, must be considered.

Ronan, K.C. (with him *Jellett, K.C.*, and *Garrett W. Walker*), for Trinity College:—

We submit the following propositions:—

1. The value is to be ascertained at the time when the statute contemplates the owner of the head-rent being brought into privity with the matter—that is, by the order for redemption.

2. In the present case the value is to be ascertained certainly not before August 4th, 1904.

As to 1 and 2, up to the Act of 1903, an opportunity was given to the owner of a superior interest to come in and object before a sale was sanctioned, in case there would not be enough to pay him. See Rule XII. of the rules under the Act of 1887. Under the Act of 1903, in cases within the "zones," sect. 1 provides that the Land Commission "shall" sanction the advance; and vendor and his tenants can, at any time before the tenants' agreements to purchase are fiated, and the order is made vesting their holdings in them, and transferring claims to the purchase-money (sect. 24 (1)), elect not to subject the owner of the superior interest to a compulsory redemption. The date of fiating the

(1) [1904] 1 I. R. 374.

agreements and vesting is the time when the owner of the superior interest is brought into contact with the matter. This is all done behind the back of the owner of the superior interest; and the sale must be carried out, although there is not sufficient money to redeem the head-rent. Fixing this date is following the procedure under the Lands Clauses Act, where the state of circumstances existing at the time of the notice to treat is, in England, considered; the corresponding period in Ireland is the publication of the notice as to the appointment of the arbitrator, which is the time at which the computation of the value is to be made of premises compulsorily purchased: *In re Doyne's Traverse* (1); *In re Parkinson* (2). In no case under the Lands Clauses Acts has it been suggested that the value of the premises taken compulsorily is to be ascertained at an earlier date than the actual time when they are taken, and in the present case that was the 4th of August, 1904, when the lands were vested in the tenants, and claims attached to the purchase-money.

3. In estimating the value of the rent, the purchase-money must be taken as the security for the rent.

4. The right of the owner of the head-rent is limited by the amount of the purchase-money; and the sale must go on whether there is money to pay him or not.

At the time the owner of the superior interest is brought into privity with the proceedings—in this case on the 4th August, 1904—the land is gone, and the purchase-money represents it; and, as above stated, the sale must go on in a case within the "zones," whether there is enough of money to redeem the superior interest or not. The argument on the other side is that the value of the superior interest is to be calculated on the circumstances which existed when the relationship of landlord and tenant was still existing; but it was not existing on the 4th August, 1904, the crucial date. The effect of the sale of land by the Land Judge discharged from a jointure is stated by FitzGibbon, L.J., in *In re Owens' Estate, No.* 3 (3), "to transfer all the rights of the jointuress from the lands to the purchase-money." The policy in the Acts of clearing the purchase-money is for the benefit of the vendor, and the purchase-money is substituted as security in place of the

(1) 24 L. R. Ir. 287. (2) [1898] 1 I. R. 390. (3) [1900] 1 I. R. 160.

Meredith, J. 1904. *In re* Close's Estate.

land. If there had been no power of compulsory redemption, the right of Trinity College would have been to have the money retained to meet the annual rent.

5. That the value and price mean what the vendor loses, and not what the purchaser from him gets.

It is clear that this is a case of compulsory purchase under the Lands Clauses Acts: see the judgment of FitzGibbon, L.J., in *In re Leader's Estate* (1):—"It seems to me that the process and its result ought to be similar to what would occur in the case of a compulsory purchase of like property under the Lands Clauses Acts or the Railway Acts." Consequently, the principles of the cases decided under the Lands Clauses Acts apply: *Commissioners of Inland Revenue* v. *Glasgow and S.-W. Railway Co.* (2); *Stebbing* v. *Metropolitan Board of Works* (3); *Morgan* v. *London and N.-W. Railway Co.* (4); *Higgins* v. *Lord Mayor of Dublin* (5). The same principles apply in the cases of land taken under other Acts, such as the Housing of the Working Classes Act. *In re Leader's Estate* (1) does not alter the law as laid down in these cases under the Lands Clauses Acts. [Counsel cited Cripps on Compensation (1892 ed.), p. 114.]

6. Evidence of special value to the owner is admissible, and that such special value, when proved, is the measure of the compensation.

7. That special circumstances may exist which make the actual income more valuable to the vendor than its capital market value.

8. That in such a case the special value to him of the income is the measure of compensation.

9. Where a person is so situated that the Court is satisfied that he is compelled by law or circumstances to turn the capital sum received into income, and that he can only benefit by it as such, the measure of compensation in such case is to be the means of acquiring an equal actual income at least equally well secured.

10. That the statute fixes Trinity College, Dublin, as such a person.

Section 39 of the Irish Land Act, 1903, shows conclusively

(1) [1904] 1 I. R. 371.
(2) 12 A. C. 315.
(3) L. R. 6 Q. B. 37.
(4) [1896] 2 Q. B. 469.
(5) 28 L. R. Ir. 484.

that the purchase-money given to Trinity College is given as an income-producing fund; and the fact of its insertion cannot be said to prevent Trinity College being given its full income which it would be entitled to receive under the Lands Clauses Acts. An intention to take away a person's property without compensation should not be imputed to the Legislature unless it is expressed in unequivocal terms: *Commissioner of Public Works (Cape Colony)* v. *Logan* (1).

11. That the measure of the security and the value of the rent must be estimated by taking into account what will be the consequences of non-payment; and if by non-payment Trinity College, Dublin, would gain and not lose, its value must be at least that of an absolutely secured annuity.

12. That the alternative to non-payment to be considered in this case is the acquisition by Trinity College, Dublin, of the same right of sale as that exercised by Mr. Close in this case, with the same results to them as have been shown by the proceedings in this case.

13. That the actual security for the rent is proved to be the sum realised by this sale, *plus* the value of the tenants' interest.

14. At all events, propositions 11 to 13 are material elements in considering the value.

Trinity College, Dublin, is the owner of the immediate reversion in this estate; so long as the rent is paid, it is worth to Trinity College £1836 yearly; if not paid, Trinity College would stand in the position of the vendor, sell to the tenants, and own the purchase-money here, *plus* the bonus. The Act of 1903 has increased the value of head-rents. It is suggested that Trinity College should only get twenty-one years' purchase; at that figure the vendor would get 148 years' purchase of his profit rent, *plus* the bonus; at twenty-three years' purchase he would get 117 years' purchase, *plus* the bonus; at twenty-five years' purchase he would get eighty-five years' purchase, *plus* the bonus; at twenty-six years' purchase he would get sixty-two years' purchase, *plus* the bonus; at twenty-seven years' purchase he would get fifty-four years' purchase, *plus* the bonus; and at twenty-seven and a-half years' purchase he would get forty-six years' purchase,

(1) [1903] A. C. 355.

Meredith, J. plus 1904. *In re* Close's Estate.

the bonus. The security for the rent was not only the purchase-money and bonus, but the tenants' interests in addition. The Act of 1903 has magnified the value of property; therefore it is idle to consider only the nominal margin as the test of value; the value of the estate must also be considered. If we found that careful trustees, after a careful investigation, came to the conclusion that they could advance £52,423 on the fee of these lands between February and July, 1904, all the opinions of valuers would be worthless. That has taken place. The Land Commission are trustees for the Treasury, the Treasury is the *cestui que trust*, for the Treasury has recognised that these lands are worth that sum. This fact is evidence to be taken into consideration. To this must be added, to ascertain the security for the rent, the tenants' interests, which probably would bring up that figure to £70,000.

15. Section 39 of the Act of 1903 does not diminish the compensation which Trinity College, Dublin, would otherwise be entitled to. This is covered by the arguments on propositions 6 to 10 above.

Jellett, K.C.:—

The first question is, At what time is the value to be ascertained; the second, How is it to be ascertained?

The first dealing with superior interests appears in section 68 of the Landed Estates Court Act, 1858, where power was given to the Court to redeem any annual or other charge, not being an incumbrance, but only on the consent of the owner. This section is incorporated with the Land Purchase Acts by section 10 of the Act of 1885. In the Act of 1887 we find how the process of redemption is to be set in motion: see sections 15 and 16. Under the Act of 1896 redemption must be carried out: see section 31. There is nothing in the Act of 1903 to alter the principles on which compensation to the owner who is compulsorily redeemed has heretofore been given. In addition to the propositions submitted by Mr. Ronan, we submit the following:—

16. That in all cases where a rent, rentcharge, or similar property is taken, a material element in estimating the loss to the vendor, and therefore the amount of the compensation, is the cost to him

of acquiring an equal income at least equally well secured: *Hicks* v. *Ross* (1); *In re Brewer* (2). We ask for such a sum as, invested at 3½ per cent., would produce our present income. This principle is not altered by the decision in *Leader's Estate* (3). That case lays down that one of the circumstances to be looked to is the selling price of similar interests. The question arises whether the selling price is to be taken before the liability to redemption has arisen, or subject to redemption. As there is a liability to redemption, there is no outside market; and yet it is said you are to ignore the only market that exists for agricultural land, that is, the amount realised by the sale to the tenants under the Land Purchase Acts. The necessity for the introduction of sect. 40 into the Act of 1896 shows that there was no outside market.

When is the value to be ascertained? When the claims to the land have been transferred to the purchase-money. How are you to ascertain the claim on the purchase-money under sect. 24 (6) of the Act of 1903 if you are to look at a state of facts which existed before there was any purchase-money? Under sect. 14 of the Act of 1887 the purchase-money is the fund for the payment of claims which formerly would have been paid out of the land, and sections 31 and 33 of the Act of 1896 deal with the purchase-money as if it were the holdings: see also section 16 (1) of the Act of 1903, providing that all claims on the lands from the date of the vesting order shall attach to the purchase-money.

S. L. Brown, K.C., in reply:—

The principles laid down in *Leader's Estate* (3) and *Kemmis' Estate* (4) govern this case. The order of the Court of Appeal in *Leader's Estate* (3) contains not only positive directions as to what should, but also negative directions as to what should not, be taken into account in fixing the redemption price of a superior interest; and among the latter it excludes, as improper for consideration, the element of indemnifying the owner against loss of income. Mr. Ronan's argument, based on the assumed analogy

(1) [1891] 3 Ch. 499.
(2) 1 Ch. D. 409.
(3) [1904] 1 I. R. 368.
(4) *Ibid.* 496.

Meredith, J. 1904. *In re* CLOSE'S ESTATE.

to cases of compensation under the Lands Clauses Act, that it is "value to the owner" and "loss to the owner" which are to determine the redemption price, is not open to him in this case. The principle applicable to cases under the Lands Clauses Act is not only excluded by the decision in *Leader's Estate* (1), but also by the Land Act of 1903: see section 39.

No authorities were cited for the proposition that, in cases under the Lands Clauses Act, the special value of the income of property to the owner is the measure of compensation.

In estimating the value of a head-rent, it is not the purchase-money but the lands which must be taken as the security. Mr. Ronan's argument to the contrary is founded on the supposed transfer of superior interests to the purchase-money. It is not the superior interest, but the claim which the owner of the superior interest had against the land in respect of that interest, which is transferred to the purchase-money. [Counsel cited section 9 (5) of the Act of 1885, section 14 (1) and 15 (1) (3) of the Act of 1896, and section 16 (1) of the Act of 1903.]

The number of years purchase of the profit rent obtained by the vendor is not an element to be considered in fixing the redemption price.

1905. Jan. 13.

MEREDITH, J.:—

This case comes before me on an application, made on behalf of the vendor, for an order to redeem

"the yearly perpetuity rent of £1551 1*s.* 1*d.* reserved by a grant in perpetuity dated the 31st day of October, 1855, and made between the Provost, Fellows, and Scholars of the College of the Holy and Undivided Trinity, of Queen Elizabeth, near Dublin, of the one part, and Maxwell Close of the other part (which said rent, in pursuance of the reservation in that behalf contained in the said grant in perpetuity and under the provisions of the Trinity College Leasing and Perpetuity Act of 1851, was subsequently increased to the yearly sum of £1836 16*s.* 7*d.*), and for an order determining the redemption price of the said rent."

I omit the reference in the notice of motion to the

"Exceptions and reservations and other superior interests reserved by the said grant in perpetuity other than the exclusive right of mining and taking minerals,"

(1) [1904] 1 I. R. 368.

for, as I understand, it is admitted on both sides that the right of shooting over the estate is practically valueless, and not one which could form a factor in the calculation of the price. I take it that is so? [*Brown, K.C.*, and *Jellett, K.C.*, signified their assent.] Now the parties have agreed to differ as to the redemption price, and it devolves upon me to fix that price, having regard to all the circumstances of the case, and the evidence produced before me. I ventured to say during the hearing of the application that the responsibility cast upon me was great—I used a stronger word—but I adhere to the statement that the responsibility is great. There is a wide difference of opinion between the vendor, on the one hand, and Trinity College, on the other, as to the price which should be fixed in respect of this rent of £1836 16*s.* 7*d.* The maximum price suggested by the vendor was £38,573. The price suggested by Trinity College in point of fact was £52,423, in other words, the entire (net) purchase-money; because, when the calculation suggested by Mr. Jellett's requisition (as developed by him) was made, it appeared that the entire purchase-money would be slightly insufficient to yield the amount which Trinity College considered themselves entitled to. There is, therefore, a difference of practically £14,000 between the parties, and that difference must be adjusted by me in accordance with the law and the rules laid down for my guidance in these matters by the Court of Appeal, so far as those rules cover the questions raised and argued in this case.

The facts of the case are really not in dispute. The originating application of Major Close, the vendor, for sale of the Brootally estate and a small portion of land known as the Doogary estate was filed with the Estates Commissioners on the 26th March, 1904. The Brootally estate, as described in the originating application, contains some 3249 acres, the poor law valuation of which is £3528 3*s.* The Estates Commissioners made what is called a Provisional Order on the 29th March, 1904, in the usual form:—

"Subject to the result of such further inquiries as may be made, the lands referred to in paragraph 4 may be regarded as an estate, and the interest payable by the purchasers may be paid until further order to the vendor."

Meredith, J. 1905. *In re* CLOSE'S ESTATE.

Further inquiries were made, and on the 10th May a notice was published in the "Dublin Gazette" in Form E of the Estates Commissioners' Rules and Forms, and notice in the same Form was given by registered letter to, amongst others, the Provost and Fellows of Trinity College. It was not, however, until the 4th August, 1904, that the Estates Commissioners certified that, having acted upon the evidence and documents mentioned in the originating application and schedule, they thought fit to deal with the vendor as the owner of the estate. Upon the same day also the final order of the Estates Commissioners was made, declaring that the lands included in the first schedule to the originating application, excluding certain plots, were fit to be regarded as a "separate estate" for the purpose of the Irish Land Act, 1903, and it was upon the same day, namely, the 4th August, 1904, that the purchase-money, advanced under the Land Purchase Acts in respect of the estate, was paid into the Bank of Ireland, and an order made attaching claims to the purchase-money, pursuant to the provisions of section 24, sub-sect. 1, of the Act of 1903. The purchase-money so paid amounted to the sum of £54,316, and in the affidavit filed in support of the present application by Major Maxwell Close he gives details relative to that purchase-money which are of some importance in the case. He states that the lands sold comprise two estates—one the Brootally estate, and the other the Doogarry estate. The Doogarry estate, however, is represented as to purchase-money by the sum of £363 only, and forms no portion of the security for Trinity College rent, and he continues:—

"The Brootally estate at one time was portion of a larger estate in the hands of the Maxwell family, the other portions being the present estates of Sir James Stronge, Bart., and Mr. Henry Bruce Armstrong, held by them under Trinity College, Dublin, and to whose estates the Brootally estate is contiguous."

I refer to that paragraph, lest it should be thought that I had overlooked the fact that the Brootally estate is contiguous to the Armstrong estate. He then states that:—

"The Brootally estate consists of eight townlands in the Barony of Armagh, County of Armagh, containing 3249A. 2R. and 16P., of which the poor law valuation is £3528 3*s*. The estate consists of agricultural land, and is entirely

in the hands of 162 occupying tenants who, for the most part, are very poor and very backward indeed."

Further on he states that :—

"The rental of the estate in the year 1847 was £2839 8*s.* 11*d.*, and £314 6*s.* 6*d.* renewal fines—in all, £3153 15*s.* 5*d.*; and between that year and the year 1851 the rental had fallen to £2644 4*s.* 5½*d.*, and £103 4*s.* 8*d.* renewal fines—in all, £2747 9*s.* 1½*d.* In the year 1861 the rental was £2977 5*s.* 2*d.* In the year 1871, and also in the year 1881, when the rents paid by the tenants were in a fair proportion to the head-rent paid to Trinity College, the rental amounted to £3293 5*s.* The rise in the rental during the period between the year 1851 and the year 1881 occurred in consequence of the increase made in the head-rent payable to the College, and was substantially in proportion to the increase, it being expressly provided by the Trinity College, Dublin, Leasing and Perpetuity Act that the under-tenants were to pay portion of the increased rent payable by the immediate landlord.

"Under the operation of the Land Acts the rental of 1881, amounting to £3293 5*s.*, had been reduced to the sum of £2171 12*s.* 4*d.* at the time of sale—a reduction of over 34 per cent. In 1895 the rental stood at £2757 14*s.* 6*d.*—an average reduction since 1881 of 16 per cent.; and from £2747 14*s.* 6*d.* in 1895 to £2171 12*s.* 4*d.* in 1903 is an average reduction of 21 per cent.

"In a good number of cases the tenants' rents were settled outside Court, and in a few cases the rents have never been reduced; but the average percentage of reduction allowed by the Sub-Commissioners on rents fixed by them was 20 per cent. on fixing the first term rents, and 30 per cent. on fixing the second term rents."

He then proceeds to state how the terms of sale were arrived at, and the purchase-money ascertained. He says :—

"To arrive at the net rental of the estate at the time of sale available for the payment of the Trinity College head-rent, from the gross rental of £2171 12*s.* 4*d.* . . . there must be taken about 10 per cent. for agent's fees, bailiff, law costs, &c., leaving a net rental of £1954 9*s.* 1*d.* to meet the College rent of £1836 16*s.* 7*d.*"

He then states that :—

"The said rental of £2171 12*s.* 4*d.* in 1903 included a sum £198 16*s.*, rents fixed prior to the passing of the Land Act of 1896; and under the agreement for sale of the property to the tenants this sum of £198 16*s.* had, in the first instance, to be reduced 20 per cent. to bring it on a level with the rents payable by the other tenants. The entire estate was then sold at a reduction of 20 per cent. on the rents paid by the tenants, the equivalent to 24·61 years' purchase. The tenants, therefore, who had had their rents fixed prior to

Meredith, J. 1905.

In re Close's Estate.

the passing of the Land Act of 1896 purchased at a reduction of 36 per cent., the equivalent to about 19½ years' purchase. As stated in paragraph 16 of this affidavit, the capital sum realised by the sale of the estate is £52,423, which is the equivalent of something under sixteen years' purchase of the rental of 1881, is just nineteen years' purchase of the rental of 1895, and is a little over twenty-four years' purchase of the rental of 1903."

There is a schedule to the affidavit which sets out that, exclusive of the Doogarry estate, the total purchase-money of the whole estate amounts to £56,025. I should explain that this figure includes the purchase-money of some holdings, the vesting of which was delayed or postponed. Deduct the arrears which were added to the purchase-money, as stated by the vendor, £1430 16*s.* 6*d.*, and further deduct one year's rent to the 1st November, 1903, which was included in the purchase-money, in all £3602, and the capital sum, according to the vendor, realised by the sale of the Brootally estate was £52,423. That, as already stated, represents a little more than twenty-four years' purchase of the gross rental, and a little more than twenty-four and a half years' purchase of the rental revised so as to bring the few first term rents down to the level of the second term rents.

The margin of annual income disclosed by this affidavit, as coming to the vendor, after payment of the Trinity College head-rent, appears a narrow one. The vendor estimates his profit rent at £117 12*s.* 6*d.*, that is, after deducting from the gross rental payable at the time of sale the 10 per cent. for agent's fees, law costs, and so on, and the Trinity College rent, he was left with a sum of £117 12*s.* 6*d.* per annum. The vendor relies upon that narrow margin of £117 12*s.* 6*d.*—liable, as he suggests in his affidavit, to a further possible reduction of £39 15*s.* 2*d.*, to bring the first term rents down to the level of the second term rents—he relies upon that narrow margin as an argument in favour of giving to Trinity College the sum I have already mentioned, viz. £38,573, which is twenty-one years' purchase of the head-rent. Mr. Ronan put in a table—an interesting table—working out the result that would thus accrue, and the gain that the vendor would derive from the sale of his estate in number of years' purchase. If Mr. Ronan's calculation be correct, it is plain that while Trinity College would receive twenty-one years' purchase of their rent, the

vendor would receive, exclusive of bonus (with which we have nothing to say), 148 years' purchase of his profit rent of £117 12*s.* 6*d.* Well, Mr. Ronan, of course, was entitled to make that observation, and entitled to point out that the £117 12*s.* 6*d.* would realise, on that basis, for the vendor something like £14,000; but, in my humble opinion, I cannot allow my mind to be affected, in estimating the redemption price of the Trinity College rent, by the mere fact that the vendor will, as a result of this sale, acquire a considerable sum of money. On the other hand, I do not think that the vendor is entitled to cry down the value of the property which formed the security for Trinity College head-rent in the way that he has done. Of course, having to fix so many of these redemption prices, I am perfectly familiar with the affidavits that are filed on behalf of vendors, sometimes by themselves, and sometimes by others on their behalf, in which the property that has been sold to the tenants is described in terms the reverse of glowing, and the circumstances of the tenants are depicted in anything but the light in which one who is interested in the future of his country would wish to have them depicted. Major Maxwell Close speaks of the tenants to whom he sold as having been "for the most part very poor and very backward indeed." But the brighter side of the picture is that nearly all of these tenants had second term rents fixed, and that those who were in the position of having only first term rents had their prices adjusted so as to bring them down to the level of the second term purchasers, and (a matter that I cannot leave out of sight) £52,423 was realised by Major Close on the sale to these tenants, exclusive of the year's rent, and the arrears of rent which were added to the purchase-money. Now, though this brighter side appears on the face of the vendor's own affidavit, I was pressed again and again by counsel on behalf of the vendor to ignore it altogether. Indeed, it was said that I would be departing from the principles laid down for my guidance by the Court of Appeal in *Leader's Estate* (1) and *Kemmis' Estate* (2) if I took more than a fleeting glance at the purchase-money, and if I allowed the amount to enter into, or form a factor in, the calculation of the redemption price. I wish to make it

(1) [1904] 1 I. R. 368. (2) [1904] 1 I. R. 496.

Meredith, J. 1905. *In re* Close's Estate.

perfectly clear, so clear that no one can misunderstand me, that I *have* taken into consideration the purchase price of this estate. I conceive it to be my duty, in estimating the redemption price of this rent payable out of the Brootally estate, to ascertain by all means within my power, and all manner of legal evidence, the capital value of the land forming the security for the rent, seeing that I have to ascertain the capital value of the rent payable out of the land.

Now, is there anything in the judgments of the Court of Appeal in *Leader's Estate* (1) or in *Kemmis' Estate* (2) which forbids me to do that? On the contrary, it appears to me that, at all events, in *Kemmis' Estate, No.* 2 (3), the judgment of the Court, pronounced by Fitz Gibbon, L.J., points to the conclusion that the amount of the purchase-money is one of the circumstances of the case which may be taken into consideration. In giving judgment in *Leader's Estate* (1), Fitz Gibbon, L.J., embodied as portion of his judgment the order which the Court of Appeal subsequently made, and it will be seen from that order that, subject to certain specified matters which this Court and the Land Judge were directed to take into account, and certain matters which they were forbidden to take into account, there was a general direction to take into account *all the circumstances of the case.* When *Kemmis' Estate* (2) was before me, I declined to fix the redemption price of a tithe rentcharge at the number of years' purchase which had been obtained by the owner from his tenants. I pointed out that the number of years' purchase obtained by the owner of an estate might in some instances be much below the number of years' purchase which should be given to the owners of the superior interests. In other instances it might be much above. It did not seem to me that it could be the sole criterion by which to measure the amount of the redemption price of the superior interest. I hold by that still, but I did not say that in circumstances such as exist in the present case, when the estate has been sold, the claims of the owner of the superior interest transferred to the purchase-money, and the purchase-money itself lodged in Court, the Court should shut its eyes to the fact that the sale of

(1) [1904] 1 I. R. 368. (2) [1904] 1 I. R. 496. (3) 38 I. L. T. R. 241.

the estate had produced so much purchase-money. The judgment of Fitz Gibbon, L.J., upon the appeal taken from my second order in *Kemmis' Estate* (1) has been furnished to me, and it appears from that judgment that it was contended in the Court of Appeal that I had gone wrong in *Kemmis' Estate* (2) by not applying the principle of the number of years' purchase obtained by the landlord to the calculation or estimate of the amount of the redemption price of the superior interest. Now, here is what Fitz Gibbon, L.J., says:—

> "In this case when we asked for a principle to be formulated the only principle suggested was, that under the circumstances of this case it must have been a valuation on a wrong principle—a principle either wrong in law or unjust in result—if a larger price in the number of years' purchase appeared to have been obtained by the selling landlord from his tenants than that at which the tithe rentcharge was directed to be redeemed. We are of opinion that no such principle can be laid down categorically. It cannot be said that under no circumstances should the price of tithe rentcharge be less than the amount paid to the landlord for his land."

He then gives an example and illustration of his meaning, and he concludes his judgment as follows:—

> "We do not say that the Judge ought to exclude as evidence of valuation the price that was actually got for the land, but it cannot go farther than that."

Well, I have not excluded the price that was actually got for the land, either as evidence of valuation or as an element to which I have had due regard in my estimate of what should be the fair redemption price in this case; and if I am wrong in having regard to that element, I have at least made it clear that I have taken it into consideration.

Having gone thus far in their favour upon the question of purchase-money, I decline to go any further in that direction with Mr. Ronan or Mr. Jellett. I may say that a large portion of the argument presented to me on behalf of Trinity College centred round the question whether I was to ignore everything else save the purchase-money, and to treat the purchase-money, and the purchase-money

(1) 38 I. L. T. R. 241. (2) [1904] 1 I. R. 496.

Meredith, J. 1905. *In re* CLOSE'S ESTATE.

alone, as the security for the College rent, and as the basis upon which my calculation should be made. I think it is clear that if I were to adopt that view I should be certainly going beyond the limit sanctioned by the Court of Appeal in the short extract from the judgment of Fitz Gibbon, L.J., which I have read.

Now, the vendor, in addition to his own affidavit, is supported by affidavits made by Mr. North, Mr. Dinneen, and others, who refer to documents and extracts from documents relative to sales of fee-farm and other rents in the Land Judge's Court and elsewhere. Mr. North, a well-known auctioneer, sets out in a schedule to his affidavit the particulars of several head-rents sold by him by auction within the last five years. The object is to show that twenty-five years' purchase is, according to his view and practical experience as an auctioneer, seldom given, except for a rent which is secured by a margin of at least two or three times the amount of the rent. [His Lordship referred to the particulars in the schedule at some length, and continued:—]

Now, Mr. North, dealing specifically with the head-rent of Trinity College in the present case, says:—

> "Owing to the fact that the said head-rent is variable under a schedule of prices of certain commodities, and especially owing to the very small amount of the margin securing same, I think that this head-rent is not a marketable security. In my opinion it could not be sold for the full value by public auction, or sold at all, unless it happened to be bought as a speculation, and not as an investment, and in that case the price that would be obtained would not, in my opinion, exceed twenty years' purchase at the outside."

As this affidavit was most strongly, and most properly, relied upon by the vendor, I desire to point out that Mr. North's statement is that for two reasons—first, because the head-rent is variable, and secondly because the margin is very small, the rent could not, in his opinion, be sold for *its full value*. His estimate of twenty years' purchase is not, as I read his affidavit, an estimate of the full value of the annuity at all, but an estimate of what somebody who happened to desire a speculation, and who did not desire an investment, might be induced to give for the rent. In reference generally to the schedule to Mr. North's affidavit, as well as to the schedules which have been entered dealing with sales on the Conolly estate, and on the estate of Geraldine Henrietta Town-

send Mundy, and also in reference to the sale by Mr. Keogh, auctioneer, referred to in the affidavits of Mr. Dinneen and Mr. O'Meara, I desire to make one observation—I have gone carefully through the particulars furnished in the case of each sale, and I confess I find it difficult to arrive at any settled principle which would enable me to lay down any rule regulating the number of years' purchase which should be given in respect of an agricultural rent issuing out of agricultural land. The prices vary to a great extent. The particulars furnished in the case of the Conolly estate and the Mundy estate contrast the yearly rents with the Government valuation. Well, that may be an admirable test, it very often is an excellent test; but apply it to the present case, and what appears? It appears that this rent of £1836 odd is secured upon premises—the poor law valuation of which is £3528 3*s*. I know, of course—it is a matter of common knowledge—that the poor law valuation in Armagh is high, relatively to some other counties. I hold that the poor law valuation is not an infallible test; and consequently before I could accept the results of the sales referred to as conclusive or final, I should like to know something more about some of the cases mentioned in the affidavit of Mr. North, and in the schedules to which I have referred. Still, I think there is a matter that emerges from a consideration of these several instances, and that is this, that while margin is not everything, a substantial margin is of importance; and on the other hand, I think there is this to be said in reference to these sales, that land purchase having been and being in the air must necessarily to some extent have affected the price of agricultural head-rents. I certainly agree with Mr. North in his statement that the full value would not be obtained at public auction for the head-rent payable out of the Close Estate. Mr. Battersby, who has made an affidavit on behalf of Trinity College, states his opinion that—

"A head-rent of the magnitude sought to be redeemed in this case, charged on agricultural lands in the county of Armagh, is not at present a marketable security, but not altogether for the reasons stated in his (Mr. North's) affidavit. In my experience the purchasers of large head-rents in the open market seek a permanent investment, and since the operation of the Land Purchase Acts in Ireland, and more especially since the passing of the Irish

Meredith, J. 1905. *In re* CLOSE'S ESTATE.

Land Act, 1903, it has been impossible to find a *bona fide* investor who would pay an adequate price for a large head-rent. He cannot overlook the fact that the payee of the head-rent probably will, in the near future, sell his estate and redeem the head-rent."

I think there is truth in that observation. I cannot help thinking that the fact that a purchaser at an auction or otherwise would have before him the possibility, perhaps the probability, of the rent he bought being redeemed in a short time, would affect the price that he would pay in the auction room or otherwise. If he gave too small a price, then when the matter came up before me for redemption he would probably be met with the observation that the market price had been fixed by himself. On the other hand, if he gave too much, he might run the risk of receiving less than he actually paid. In any event the investment would, to a certain extent, lack the element of permanency. However, I have considered and given the greatest attention to the affidavits and the schedules referred to, and the affidavits filed on behalf of Trinity College, and I come now to apply the evidence before me to the question of price. Before announcing the conclusion that I have arrived at, I wish to read the actual order of the Court of Appeal in *Leader's Estate* (1)—

> "Declare that the redemption price of the rent in the said order mentioned ought to be fixed at the price or sum which appears upon due consideration of all the circumstances of the case—of the selling prices of similar interests, of the value of money, and of the fact that the redemption is compulsory—to be the fair value thereof; but that the amount of the said price ought not to be affected by the consideration of indemnifying the owner of the said rent against loss of income by reason of the difference between the annual amount of the said rent and the annual income of any investment or class of investments in which the redemption money might be invested."

I have considered all the circumstances of the case, all the evidence that has been adduced before me; I bear in mind the fact that the rental existing at the date of the sale, though only amounting to £2171 12*s.* 4*d.*, was practically a second term rental; I bear in mind the poor law valuation; and I may say that, notwithstand-

(1) [1904] 1 I. R. 374.

ing the affidavit of Major Close, I venture to think that *some* of the difference between the amount of the rent and the poor law valuation may be accounted for by the fact that the tenants who have had their judicial rents fixed have made improvements upon their holdings for which they were properly allowed in the fixing of fair rents. I take into consideration, as I have said, the price which the vendor obtained from his tenants; I take into consideration the evidence as to the sale of agricultural rents in Ireland; I take into consideration the value of money, and the fact that the redemption is compulsory; and under all the circumstances of the case I estimate the redemption price of this rent of £1836 16*s.* 7*d.*, with all its advantages and infirmities, at the sum of £45,000. I desire to say that, in arriving at that figure, I have had regard to what I consider an infirmity in this College rent, namely, the liability to—the possibility of—variation. In other cases of rents payable to Trinity College—in cases upon the Tollemache estate —I have fixed the redemption price at a figure which I understand was over twenty-six years' purchase. Those cases were cases not of a variable rent, but of rents not liable to variation. The circumstances of each case must, in my opinion, ultimately decide the amount of the redemption price. The circumstances in *Tollemache's Case* (1), in addition to the absence of the infirmity which affects this rent, were entirely different from the circumstances in this case. There was in *Tollemache's Case* (1) a very large margin. In point of fact, on the circumstances of that case, and having regard to the fact that the rent was not variable, and to the very large margin, I fixed the price at the amount I have stated. In another case of a rent payable to Trinity College, referred to in the affidavit of Mr. Synott, which was to a certain extent commented upon by Mr. Matheson and Mr. Brown, in *Armstrong's Estate* (2) which is contiguous to this estate, I fixed the price at a figure which I understand came to something over twenty-one years' purchase. The facts as disclosed in the affidavits and evidence before me in *Armstrong's Case* (2) were as different, in my opinion, from the facts and circumstances disclosed in this case as two cases could well be. I said at the

(1) Unreported. (2) Unreported.

Meredith, J. 1905. *In re* Close's Estate.

time in fixing the price in *Armstrong's Case* (1) that I considered it an entirely exceptional case. I consider it so still. But whether I was right or wrong in *Armstrong's Case* (1), I hold that I am bound in each case, as it comes before me, to deal with the facts, the particular facts and circumstances of the particular case, and to spare no labour of my own in trying to arrive at a correct conclusion. I have often quoted the words of Oliver Wendell Holmes, in connexion with this matter of fixing redemption prices. They come home to me very often when I am, as I sometimes am, accused of inconsistency, "Don't be consistent, but simply be true"; and as long as I adhere to that maxim I feel I am likely to come as nearly right as other tribunals.

Now, that being my decision, there are one or two matters that I must deal with before closing. Mr. Ronan and Mr. Jellett suggested that, mainly by way of supplement (as they argued) to the order and decision of the Court of Appeal, I should lay down and act upon certain principles which would, in their opinion, enhance the value of their client's head-rent. Well, some of them I have already dealt with—I have practically dealt with the first, second, third, and fourth requisitions.

"At what time is the value to be ascertained?" asks Mr. Ronan. I answer that, in this case, I have ascertained the value of the superior interest as of the 4th August, 1904, the most suitable date, because on that day, as I have already pointed out, the sale of the estate was closed, the purchase-money was lodged in Court, and the claims were transferred to the purchase-money. Nos. 3 and 4 ask me to hold—

> (3) That in estimating the value of the rent, the purchase-money must be taken as the security for the rent.
>
> (4) That the right of the owner of the head-rent is limited by the amount of the purchase-money, and that the sale must go on, whether there is money enough to pay him or not.

I have incidentally dealt with these already. I have nothing further to say, save this: In some cases, no doubt, if there be no other security for the rent, the vendor cannot get more than

(1) Unreported.

the amount of the purchase-money. I had, however, a case before me lately in which the estate that was sold was primarily liable for the rent, but the rent itself was charged (as between the owner of the rent and the owner of the lands) upon lands that were not the subject-matter of the sale at all. The vendor in that case urged me to look at the purchase-money, and the purchase-money alone; and pointed out that if I were to take into consideration the outside security, the redemption price would be inflated, and the amount that would be coming to him would be very considerably diminished. I declined to regard the purchase-money alone as the security for the rent, and I fixed the price which the vendor was to pay, having regard to the entire security, purchase-money, and additional lands. Well, in No. 5, Mr. Ronan says—

(5) "That the value and price mean what the vendor loses, and not what the purchaser from him gets."

My own opinion is that in one aspect of the case that may be answered without hesitation in the affirmative. What the vendor loses is undoubtedly—by the term vendor in these requisitions is meant the owner of the superior interest—what the owner of the superior interest loses is an annuity or rent of £1836 16*s.* 7*d.* But in point of fact requisition No. 5 is merely introductory to the requisitions which follow, and the real question which gave me pause, in addition to the question as to the extent to which the purchase-money should be considered, and which is not affected, as I think, by the decision of the Court of Appeal, was that contained in requisitions No. 6 to No. 10:—

(6) "Evidence of special value to the owner is admissible, and that such special value, when proved, is the measure of the compensation.

(7) "That special circumstances may exist which make the actual income more valuable to the vendor than its capital market value.

(8) "That in such cases the special value to him of the income is the measure of compensation.

(9) "Where a person is so situated that the Court is satisfied that he is compelled by law or circumstances to turn the capital sum received into income, and that he can only benefit by it as such, the measure of compensation in such case is to be the means of acquiring an equal actual income at least equally well secured.

(10) "That the statute fixes Trinity College, Dublin, as such a person."

Meredith, J. 1905. *In re* CLOSE'S ESTATE.

Now, it does appear to me that the Court of Appeal have left it absolutely open to this Court to take special circumstances into account. They have directed me (subject as I have already mentioned) to fix the price after due consideration of all the circumstances of the case, and I hold myself perfectly free to give effect in money value to special circumstances where they exist; but I have searched the books in vain, and I have found no case in which the special circumstances of the individual, as distinguished from circumstances affecting the property, were held to have *a money value.* The special circumstances alleged to exist in the present case are that Trinity College, Dublin, must utilise the redemption price, when paid to them, as an income-bearing fund. It has been said that the case would be different if the purchase-money was to be paid to a financier, to a man who might put his money into a venture and get 10 per cent. for it; but that because Trinity College must utilise the fund for the purpose of income, must deal with it for ever as a fund to produce income, and must be careful and prudent in their investments, the vendor must pay a higher price for the head-rent, for mere money, than he would have to pay to an ordinary member of the community. As I say, I have failed to find any authority for the proposition. I do not think it is sound law, and with every respect I would almost venture to say that I do not think it is sound sense. This is *an annuity* of £1836. Whether it is receivable by Trinity College, or whether it is receivable by archbishops and bishops, or by a hospital, or by any public body, or by an individual, it is £1836, charged upon property, and the measure of its value must, in my opinion, be the same in each and every case. If I yielded to the argument of Mr. Ronan and Mr. Jellett on this point, I should have, in my opinion, to yield to a similar argument in the case practically of all settled rents. It seems to me that the mere fact that a man's father or grandfather, or the man himself, has put an annuity or rentcharge in settlement, and that the capitalised value must be paid to the trustees of the settlement, affords a very bad reason for making a vendor pay a bigger price than he would have to pay to the man whose property was not in settlement. At all events, there is my view, and if I am wrong I can be set right.

In requisitions 11 and 12 the point is raised—

(11) "That the measure of the security and value of the rent must be estimated by taking into account what will be the consequences of non-payment, and if by non-payment Trinity College, Dublin, would gain and not lose, its value must be at least that of an absolutely secured annuity.

(12) "That the alternative to non-payment to be considered in this case is the acquisition by Trinity College, Dublin, of the same right of sale as that exercised by Mr. Close in this case, with the same results to them as have been shown by the proceedings in this case."

Well, in a sense that is all perfectly true, but it is equally true of every other rent that is secured in the same way that this is secured. The penalty for non-payment of the rent is loss of the property; and the grantor or lessor re-enters by ejectment. That is a matter that has been taken into consideration in estimating the value of the security; but, in my opinion, to make it the measure of the security would be contrary to settled principles. The rent is a rent charged upon land; one method of enforcing the due and effectual payment of the rent is ejectment in the event of the rent not being paid. In such an event, no doubt, Trinity College, if default happened in this case, would have been entitled to enter into possession, and that is a matter that cannot be left out of sight; but the method of enforcing the effectual payment of the rent is only one element in estimating its value. In the thirteenth requisition Mr. Ronan says:—

(13) "That the actual security for the rent is proved to be the sum realised by this sale, *plus* the value of the tenants' interest."

I find it somewhat difficult to follow that. What Trinity College would have gained in the case of an ejectment would have been the right to receive the rents, which were practically all judicial rents; and if I understand rightly the 12th section of the Act of 1896, coupled with the 15th section of the Act of 1881, unless it were shown that the non-payment of the rent was by default of the tenants, the tenants would have become tenants to Trinity College, and Trinity College would stand in the shoes of Major Close. It seems to me extremely unlikely that the contingency that Trinity College would gain both Major Close's

Meredith, J. 1905.

In re CLOSE'S ESTATE.

interest and the tenants' interest would have happened; but of course there is this to be said, that the judicial rents are fixed after allowing the tenants the value of their improvements, and that makes the judicial rents much more secure than the ordinary rent would be. I have taken into consideration in assessing the price the fact that these are judicial rents, and, therefore, necessarily the tenants' interest has been taken into consideration. I need not go through requisition No. 14, because I have already indicated the view I take in respect of it. As to requisition No. 15, in reference to section 39 of the Act of 1903, it is sufficient to say that counsel on behalf of the vendor entirely concurred in the view of Mr. Ronan and Mr. Jellett—that is to say, that section 39 of the Act of 1903 does not diminish the compensation the College would be entitled to if that section had never been passed. I have fixed the fair redemption price of the rent; and when that is done, section 39 may or may not come into operation; whether it does or does not come into operation, it is agreed on both sides that it is of no importance in the case.

The last point I have to mention is the additional proposition submitted by Mr. Jellett. He says:—

> (16) "That in all cases where a rent, rentcharge, or similar property is taken, a material element in estimating the loss to the vendor, and therefore, the amount of the compensation, is the cost to him of acquiring an equal income at least equally well secured."

Bearing in mind the searching nature of the previous requisitions (fifteen in number), I asked Mr. Jellett what he meant by his sixteenth problem. He answered, as I expected he would, fairly and openly, that his clients should be awarded such a sum of money as, invested at 3½ per cent., would produce the £1836. I have already pointed out that a calculation made at the time upon that basis showed that the entire sum of £52,423 would not suffice to pay Mr. Jellett's clients. But in reference to several of these requisitions, and particularly in reference to that requisition of Mr. Jellett, I desire to emphasise and repeat the argument of Mr. Brown in his reply in this case, namely, that the order in *Leader's Estate* (1) is in two parts—one

(1) [1904] 1 I. R. 374.

affirmative, and the other negative, and the latter portion, the negative portion, says:— *Meredith, J.* 1905. *In re* CLOSE'S ESTATE.

> "But that the amount of the said price ought not to be affected by the consideration of indemnifying the owner of the said rent against loss of income by reason of the difference between the annual amount of the said rent and the annual income of any investment or class of investments in which the redemption money might be invested."

Now, language could not be clearer than that, and if Mr. Jellett's sixteenth requisition is a requisition conflicting with that, it is impossible that I should accede to it, or take it into consideration. If Mr. Jellett says, "What I mean by that requisition is that you are to take into consideration the value of money," then I say I have already done that. I have taken into consideration the value of money in fixing this price, and no more remains to be said. I have to apologise for the length of this judgment; the importance of the case is my only excuse. The Provost and Fellows of Trinity College are, of course, entitled to their costs in the matter, and the vendor is also, of course, entitled to his costs.

Solicitors for the vendor: *Richardson & Synnott.*
Solicitor for Trinity College: *Frederick D. Darley.*

W. C. S.

Meredith, J.

1905.

Jan. 10, 23.

ESTATE OF TALBOT CROSBIE.

CATHERINE DUGGAN AND MARY WALSH, TENANTS.

Landlord and tenant—Land Purchase Acts—Meaning of term "judicial rent" in section 1 of the Irish Land Act, 1903.

Upon the same day A, the agent for the vendor, accepted service of an originating notice by a non-judicial tenant to fix a judicial rent, a consent was entered into fixing such rent, and an agreement for purchase was signed:

Held, that the case did not come within section 1, sub-section (1), of the Irish Land Act, 1903.

An agreement and declaration, fixing a second term judicial rent, was signed on March 7, 1904, lodged on March 30, 1904, and filed on June 30, 1904. Meantime an agreement for purchase was signed on April 30:—

Held, that the case did not come within sect. 1, sub-sect. (1) (*a*), of the Act.

The "judicial rent" mentioned in sect. 1, sub-sect. (1) (*a*) and (*b*), must be an existing judicial rent at the date of the purchase agreement.

QUESTIONS of law referred to a Judicial Commissioner by the Estates Commissioners under section 23 (1) of the Irish Land Act, 1903.

The facts were:—The vendor made agreements with two tenants, Catherine Duggan and Mary Walsh, for the purchase of their holdings by them. Catherine Duggan was a non-judicial tenant. On the 30th of April, 1904, the agent for the landlord, the vendor, accepted service of an originating notice by her to fix a judicial rent. On the same day a consent was signed by her and the agent, agreeing on the rent to be fixed. On the same day the tenant signed a purchase agreement. On the 26th of July, an order, grounded upon the consent, was made by the Land Commission, fixing the fair rent of the holding.

Mary Walsh was a first term judicial tenant. On the 7th of March, 1904, an originating agreement and declaration was entered into between her and the vendor, pursuant to section 8 (6) of the Land Law (Ireland) Act, 1881, agreeing to a second term rent. The rent gale-day was the 25th of March, 1904. This

agreement and declaration was lodged in the Land Commission on the 30th of March, and was filed on the 30th of June. Meantime, on the 30th of April, 1904, she and the vendor signed a purchase agreement, which was lodged in the Irish Land Commission on the 26th of July.

The Estates Commissioners referred the following question to a Judicial Commissioner as to each tenant:—"Is this holding, having regard to the date of the purchase agreement, a holding subject to a judicial rent fixed or agreed to since the passing of the Act of 1896, on which the Commissioners, pursuant to section 1 of the Act of 1903, are bound to sanction the advance applied for.

Jellett, K.C., for the vendor:—

These holdings were subject to judicial rents at the dates of the purchase agreements, and so the Estates Commissioners are bound to sanction the advances under section 1 (1*a*) of the Irish Land Act, 1903. The words in that section are "fixed or agreed to." If the words "agreed to" have not the same meaning as "fixed," they must mean something previous to, and preliminary to, the fixing. The rents were existing operative rents upon which the tenant could have been sued.

[The following cases were cited: *Givan* v. *Moffitt* (1); *Woodside* v. *Massey* (2); *Jackson & Verner* v. *Irvine* (3); *Dunne* v. *Knowles* (4); *Church* v. *M'Poyle* (5); *Fulton* v. *Templeton* (6).]

MEREDITH, J.:—

Jan. 23.

Two questions of law arising in reference to the application made by two tenants upon this estate, namely Catherine Duggan and Mary Walsh, have been referred to me by the Estates Commissioners for decision, pursuant to section 23, sub-section 1, of the Act of 1903. The question involved in each of the cases is one of great importance, not merely to the parties concerned,

(1) 14 L. R. Ir. 252.
(2) 28 L. R. Ir. 604.
(3) *Ibid.* 473.
(4) [1896] 2 I. R. 671; [1898] 2 I. R. 308.
(5) 22 I. L. T. R. 85.
(6) [1898] 2 I. R. 321.

Meredith, J. 1905. *In re* Talbot Crosbie's Estate.

but to vendors and purchasers, and intending vendors and purchasers, under the Act of 1903. I take the case of Catherine Duggan first. Catherine Duggan was a non-judicial tenant, holding at the rent of £56. It appears from the affidavit of Mr. George Trench, the agent of the landlord, that, acting under instructions received from the landlord, he carried out negotiations with the tenants on this estate for the sale to the tenants of their respective holdings under the Land Purchase Acts. Dealing with the case of Catherine Duggan, he says:—"On the 30th April, 1904, I accepted service, on behalf of said landlord, of an originating notice, whereby the said Catherine Duggan applied to the Court for an order fixing the fair rent of her holding, and, subsequently to my accepting service, a consent, also dated 30th April, 1904, was signed by the said tenant and by myself, for the said landlord, whereby the fair rent of the tenant's holding was agreed to; and on this consent being signed and perfected, the said tenant, Catherine Duggan, signed a purchase agreement, also dated April 30th, 1904." Now, by the Rules of Court made under the Land Law Acts, the procedure as regards the service of originating notices is definitely and clearly settled. Rule 23 of the rules of 2nd January, 1897, provides:—"The first notice of application to the Court seeking its decision upon any question which the Court has jurisdiction to decide under the Land Law Acts shall be termed an originating notice." And Rule 24:—"Every originating notice shall designate the Court selected, either the Civil Bill Court or the Land Commission. It shall be first served on the opposite party, that is to say, on the landlord, or tenant, or other person or persons sought to be bound by the decision of the Court, and forthwith after such service or the last of such services, if more than one, two copies thereof shall be served on the Clerk of the Peace, or one copy on the Land Commission according to the Court selected." The Court selected or designated in the originating notice was the Land Commission. Rule 28 provides:—"As soon as an originating notice has been served upon the Clerk of the Peace, or the Land Commission, as the case may be, as well as upon the party or parties, the matter shall be deemed to be in Court as a case to be decided." At the date, then, that the purchase agreement was

entered into, the tenant, Catherine Duggan, was a non-judicial tenant, and had not even served, in compliance with the rules, an application to have a fair rent fixed. As a matter of fact, the originating notice was not served upon the Land Commission until, as far as I can ascertain, the 22nd July, 1904; and it was only on the 26th July, 1904, that an order was made, on consent of the landlord and the tenant, whereby, after reciting that the tenant had served, on the 22nd July, an originating notice for an order fixing the fair rent of the holding, and that a consent in writing had been signed by the tenant and the agent for the landlord, dated 30th April, 1904, the Court fixed and determined the annual sum of £49 6*s.* 6*d.* as the fair rent of the holding. The originating application, with a view to the sale of the landlord's estate, appears to have been lodged with the Estates Commissioners on the 26th July, that is to say, on the same day as the order on consent fixing the judicial rent had been made by the Land Commission. In this state of affairs, the Estates Commissioners ask me, as a question of law, whether, having regard to the date of the purchase agreement, this holding is "a holding *subject to a judicial rent* fixed or agreed to since the passing of the Act of 1896," in which the Commissioners, pursuant to section 1, are bound to sanction the advance applied for? Now the first section of the Act of 1903 provides that in certain cases the Land Commission shall sanction the advance of the whole money applied for if they are satisfied that the tenant is in occupation of the holding, and subject to the limitations in the Land Purchase Acts on advances to tenants purchasing their holdings. If the conditions of the section are complied with, the advance must be made; and I have no desire or intention to discuss the motives or the intentions of the Legislature other than as expressed in terms by the section itself. Parliament must be held to have meant what it said, and said what it meant. What does section 1 say? [His Lordship read section 1, sub-sections (1) and (2).] Section 5 contains further provisions in case of the sale of an estate where application for an advance is made to which the provisions of sub-section 1 of section 1 of the Act do not apply.

Now the *application* made in compliance with the rules and

Meredith, J. 1905.

In re TALBOT CROSBIE'S ESTATE.

forms of the Estates Commissioners is dated 30th April, 1904. It is embodied in a joint agreement in form "G" between the vendor and several tenants, and clause 3 of that agreement is as follows:—"Each of the said tenants hereby applies to the Irish Land Commission for an advance of the whole of the said purchase-money for the purpose of said purchase, such advances to be respectively repaid by the annuities mentioned in the said schedule payable as by the Irish Land Act, 1903, provided." The schedule referred to is incorporated in express terms in the agreement. In column No. 7 of the schedule, the heading of which is, "If judicial, record number as stated in order or agreement fixing rent and date of same. If not judicial, state shortly particulars of contract of tenancy." The particulars are given: "Consent, 30th April, 1904," as also, "Record No. 8,185; Order dated 26th July, 1904." The latter words were added obviously after the order of the Land Commission, and before the purchase agreement was actually filed with the Estates Commissioners. Now I put aside all other points; and my decision that this is a case in which the Estates Commissioners are not *bound* to sanction the advance applied for is based upon the true construction, as it appears to me, of section 1. I think it is plain, having regard to the provisions of the section, that this case does not come within what are known as the "zones." Let me recapitulate what I consider the most relevant parts of the section.

"When *application* is made for an advance under the Land Purchase Acts [I omit all unnecessary words] in the case of the purchase of *a holding subject to a judicial rent* fixed or agreed to since the passing of the Act of 1896, if the purchase annuity created under this Act payable in respect of the advance will be not less than 10 or more than 30 per cent. below the *existing rent*," coupled with the proviso that "in the case of a holding subject to a *judicial rent* fixed or agreed to before the passing of the Act of 1896, the Land Commission may, if they think it equitable, *and if the purchase agreement so provides*, treat the holding for the purposes of this section *as a holding subject to a judicial rent, fixed since the passing of the Act of* 1896." I cannot help thinking that, upon the true construction of the section, the Legislature intended, and I hold their intention to be, that the

landlord and tenant, at the date of the purchase agreement, which *is* the "application" for an advance, should deal with a state of facts actually existing, and not a state of facts which might thereafter come into existence. I think the words "holding subject to a judicial rent," read in the light of the context, necessarily imply that the holding must be one which, at the date of the purchase agreement (in respect of which the application for an advance is made), is subject to a *judicial* rent existing operative and unconditional.

Any other construction would, I think, open the door to evasion, at all events, to use no stronger word, of the provisions of section 1. I cannot agree with Mr. Jellett's argument as to the meaning of the words "judicial rent fixed *or agreed to* since the passing of the Act of 1896." They point to a judicial rent *in esse*, which has resulted from judicial decision, or from agreement between the landlord and tenant. They cannot mean that the landlord and tenant, dealing with a non-judicial tenancy, may contemporaneously with the execution of a purchase agreement arrange or agree that in order to facilitate the carrying out of the purchase agreement an originating notice should be served, and a fair rent fixed by consent. Let me refer to the provisions of the 35th section of the Act of 1896, and see what would be the result of Mr. Jellett's contention. [His Lordship read the section.] I may add that clause 7 of the agreement in this case fixes the rate of interest. Therefore, if the application for an advance in the present case is granted, and the sale carried out, this tenancy, which was not a judicial tenancy at the date of the purchase agreement, which had not even gone the length of being in Court at the date of that agreement, is a tenancy in respect of which no farthing of rent could ever thereafter become payable, inasmuch as by the very terms of the agreement itself, and of the section I have read, interest on the purchase-money *from the date of the agreement* would run, and be payable to the Land Commission, and all rent, and arrears of rent, affecting the holding at the date of the agreement would be wiped out.

But while I determine that upon the true construction of the statute, the holding must, at the date of the purchase agreement, be subject to an existing judicial rent, and that this holding was

Meredith, J. 1905. *In re* TALBOT CROSBIE'S ESTATE.

not, and cannot be, considered a holding subject to a judicial rent within the meaning of the statute, I desire to state that I see nothing whatsoever, either in this case or in the next case, that can, by any stretch of imagination, be considered anything more than an attempt to accelerate the speed of the land purchase machine. I do not say, nor do I think, and I feel sure that the Estates Commissioners did not think, that there was any suggestion of fraud, or collusion, or unfair dealing. The thing is, perhaps, impossible; but no matter how fair and no matter how just the arrangement, I must decide according to law, or, at all events, according to the view that I take of the law.

Well, the second case is that of Mary Walsh, and it stands in a different position. In the affidavit of Mr. Trench, having stated (as I have already mentioned) that, acting under instructions from the landlord, he carried out negotiations with the tenants on this estate for the sale to them of their respective holdings under the Land Purchase Acts, he goes on to say, in the third paragraph, that on the 7th March, 1904, an originating agreement and declaration was signed by Mary Walsh, the tenant, and by himself, acting for the said landlord; "and subsequently, on the 30th April, 1904, a purchase agreement was signed by the said Mary Walsh, and has since been lodged in the proper office of the Land Commission"; and he refers to a certified copy of the agreement and declaration, and to a copy of the purchase agreement.

Now, Mary Walsh's case differs from Catherine Duggan's case, because long prior to the Act of 1896, Mary Walsh was the tenant of a judicial tenancy, the fair rent of which had been fixed for a first statutory term, and (as I observe by the file) fixed by the Chief Land Commissioners on appeal, at the sum of £105. I may say that the original rent of Mary Walsh was £129 10*s.*, and the rent fixed by the Appeal Court, over which Mr. Justice O'Hagan presided, for the first term was £105. The term began in 1884, and ended in 1899, and the agreement and declaration signed upon the 7th March, 1904, was, therefore, signed at a correct date. The first statutory term had expired, and the parties were entitled to proceed to have a judicial rent fixed for a second term; by originating agreement and declaration or otherwise, and the second term rent fixed by the agreement and declaration was £70.

That agreement and declaration was lodged on the 30th March, 1904 (just one month before the purchase agreement was signed), and it was filed on the 30th June, 1904, and on the figures it would certainly appear that the case was not merely *bonâ fide*, but that the rent proposed to be fixed as the judicial rent for the second statutory term was, on the view, an extremely fair one. The curious part of the case is that if Mr. Talbot Crosbie and Mary Walsh had waited until that agreement and declaration had been filed (as it was filed upon the 30th June, 1904), they would, in my opinion, have clearly been within the provisions of section 1. Cases may arise in which (even when an agreement and declaration has been filed) the attention of the Court may be called to some matters requiring intervention; but so far as this agreement and declaration of Mary Walsh's is concerned, I entertain no doubt that if the purchase agreement had been executed on the 1st July, 1904, the case would come within the mandatory provisions of section 1 of the Act, and the Estates Commissioners would be *bound* to sanction the advance.

But the reasons I have given for my decision in Catherine Duggan's case apply with equal force to Mary Walsh's case. The date of the purchase agreement is the date—the crucial date—to be regarded for the purpose of determining whether the holding is "subject to a judicial rent." The same date is in my opinion the crucial date to be regarded for the purpose of determining whether the holding is "subject to a judicial rent fixed or agreed to since the passing of the Act of 1896."

The proviso at the end of sub-section 1 of section 1 supports and emphasizes this view. In other words, the "rent fixed or agreed to since the passing of the Act of 1896" must, in my judgment, be at the crucial date an existing operative unconditional *judicial* rent. The *judicial* character had not been stamped upon or given to the fair rent of £70 when the purchase agreement was signed. An essential element was lacking. Mr. Jellett presses me with the cases of *Fulton* v. *Lord Templeton* (1); *Dunne* v. *Knowles* (2); and *Church* v. *M'Poyle* (3); but on the most careful consideration of these cases, I think that the utmost length

(1) [1898] 2 I. R. 321. (2) *Ibid.* 308. (3) 22 I. L. T. R. 85.

Meredith, J. 1905.

In re Talbot Crosbie's Estate.

to which they can be pushed in the present case is this, that they decide that the agreement and declaration of the 7th March, 1904, "fixed" the rent, but that such rent did not become and could not become a "judicial" rent until the *filing* of the agreement and declaration on 30th June, 1904. If I am right in the view I take of those cases, and of section 1, then, until the filing had taken place, there was no existing judicial rent of £70, either fixed or agreed to within the meaning of the section, and therefore, so far as the zone limit is concerned, the agreement for purchase was premature. To each of the questions submitted for my decision by the Estates Commissioners I shall answer, "The Commissioners are not *bound* to sanction the advance applied for"; but of course the decision that they are not bound does not for a moment suggest, nor is it intended to suggest, that they should not, in the exercise of their discretion, sanction the advance applied for. The formalities required by the statute in cases that do not come within the zones must be complied with in both instances, because in the case of Mary Walsh, though she was at the date of the purchase agreement a judicial tenant, a first term tenant, or rather one whose judicial rent was fixed before the Act of 1896, the purchase-money agreed upon is such as to prevent the case coming within the zones, not because it is too high, but because it is too low. According to a calculation I have made—40 per cent. below the existing rent being the limit under the Act—the reduction in Mary Walsh's case amounts to more than 40 per cent. Accordingly, the matter is one to be dealt with by the Estates Commissioners.

Jellett, K.C.: In the case of the landlord desiring to take the case to another tribunal, I suppose I may count on your Lordship's permission to do so?

Meredith, J.: Certainly, if it is necessary.

Jellett, K.C.: The only other matter I would like to know is this. Supposing we don't appeal at all, is it competent for the landlord and tenant, if they so desire, to withdraw the agreement entirely? I don't know whether this is a matter that will come before your Lordship or the Estates Commissioners.

Meredith, J.
1905.
In re TALBOT CROSBIE'S ESTATE.

I take it that we can do that; it is our own agreement, and if we do not choose to go on with it, it is nobody's affair but our own. Of course, it will require mutual consent before it can be done.

MEREDITH, J: I do not desire to express any opinion in reference to that matter, but I do desire to express this opinion, that the 1st section of the Act of Parliament, in making it mandatory upon the Land Commission to advance the price agreed upon between the parties, certainly contemplated that the transactions which were to come within that section were to be real transactions.

Solicitors for the vendor: *Moore, Keily, and Lloyd.*

W. C. S.

Barton, J.
1905.
March 22, 23, 25.

BOYLE *v.* HOLCROFT.

(1904. No. 752.)

Landlord and tenant—Sporting rights—Exclusive right of fishing—Judicial tenant—Interference with right—Injunction.

A judicial tenant will be restrained from erecting, or keeping erected, an obstruction to the reasonable exercise of the exclusive right of fishing reserved to the landlord, under the Land Law (Ireland) Act, 1881, sect. 5, which is not the necessary result of the *bona fide* and reasonable exercise by such tenant of his right, as tenant of the lands, in the proper cultivation and management thereof.

So, where a judicial tenant erected a barbed wire paling on his holding, along a salmon and trout river, opposite a salmon pool, in such a position as to prevent all reasonable exercise of the exclusive right of fishing, reserved as aforesaid, by a grantee of such right, the Court granted an injunction, being of opinion, on the evidence, that the barbed wire paling was not erected in the *bona fide* and reasonable exercise of the tenant's rights, as stated above.

TRIAL OF ACTION.

By an indenture, dated the 18th of April, 1891, Thomas M. Richardson assigned to the plaintiff in this action the sole and

Barton, J. 1905. BOYLE v. HOLCROFT.

exclusive right of fishing on that part of the River Dee, which passed by or through his lands situate in the townland of Richardstown and county of Louth, together with liberty for the plaintiff and all persons authorised by him at all reasonable times to enter upon the said lands for the purpose of fishing and preserving said fish.

Portion of said lands, comprising about 49 acres, was held by the defendant from said Thomas M. Richardson under a judicial tenancy. At the time of the fixing of the fair rent by the Land Commission the sporting rights were exclusively reserved to the landlord under section 5 of the Land Law (Ireland) Act of 1881.

At a certain spot, where defendant's lands skirted the river, there was a salmon pool. At this place the defendant erected a barbed wire paling, extending along the river for a distance of 130 yards, 3½ feet in height with four strands of barbed wire, and from 4 feet to 9 inches from the edge of the river, thereby obstructing the plaintiff's right of fishing.

The plaintiff claimed an injunction to restrain the defendant, his servants and agents, from entering and trespassing upon the fishery of the plaintiff and from obstructing him in the enjoyment thereof, and from erecting, or allowing to be erected, any wire paling or other obstruction, and from permitting any such wire paling or other obstruction then erected to remain in such a position as to obstruct the plaintiff in the exercise of his right of fishing.

The defendant in his defence averred that at the place where the paling was erected the banks of the river were very low and the water shallow, and that the said paling was erected in the due course of husbandry for the purpose of preventing the trespass of cattle upon defendant's farm and crops, and for the purpose of protecting defendant's cattle on his lands and preventing them escaping, and that same did not obstruct plaintiff's right of fishing.

The defendant also averred that there had always been, within living memory, a fence or paling at or near the spot where the present paling was erected. This, however, was denied by the plaintiff.

The evidence, so far as it is material, appears fully in the judgment of Barton, J.

Matheson, K.C., *Jellett, K.C.*, and *Dickie*, for the plaintiff :—

The plaintiff is clearly entitled to bring this action. No doubt the wrong complained of is a breach of the statutory condition contained in section 5 of the Land Law (Ireland) Act, 1881; but the remedy by notice to quit contained in that section is only a cumulative and not an exclusive remedy: *Steele* v. *Tiernan* (1); *Richardson* v. *Murphy* (2). The landlord's sporting right, reserved to him by section 5 of the Act, is an overriding one, and cannot be interfered with in any way by a tenant.

S. L. Brown, K.C., and *Donaldson*, for the defendant :—

As to the wire fence, the plaintiff has failed. It is contended that the defendant has no right to prevent cattle straying on his lands, if it interferes with plaintiff's right of fishing, but the *bona fide* exercise of agriculture is predominant over sporting rights. Independent of the Land Law (Ireland) Act, 1881, section 5, the owner of a right of fishing has no right to go on the banks of a river unless the right is specially reserved to him: *Ecroyd* v. *Coulthard* (3). The right of entry conferred by the statute is a new right; and there being no right of entry before, the new right cannot be more than a right of entry on the property in the state in which it is from time to time in the regular course of agriculture. It is not an absolute right. Could an action be brought against us for making a fence too high or locking a gate? How is defendant in future to use his farm if the paling is moved back in the manner plaintiff requires, viz.: to a distance of 30 yards from the river, which would be tantamount to a relinquishing by the defendant of nearly an acre of ground? Defendant has the right to use his land up to the river, and till it if he so chooses. If crops were growing there, the plaintiff could not complain if they were of such a nature as to interfere with his right of fishing.

The defendant's right to do what is necessary for the proper tillage, culture, or usage of his farm, is laid down in *Fetherstonhaugh* v. *Hagarty* (4); *Jeffryes* v. *Evans* (5); *Gearns* v. *Baker* (6).

(1) 23 L. R. Ir. 583.
(2) [1899] 1 I. R. 248.
(3) [1898] 2 Ch. 358.
(4) 3 L. R. Ir. 150.
(5) 19 C. B. (N. S.) 246.
(6) L. R. 10 Ch. 355.

Barton, J. 1905.

BOYLE v. HOLCROFT.

The last was a very strong case, for what was done there actually destroyed the sporting rights for a whole year.

As to whether defendant acted in a manner reasonably necessary for the cultivation of his farm, the evidence shows that the river is shallow and the banks low-lying and broken in places, so that cattle can easily stray on to the lands. There is no obligation on the defendant to repair the banks.

If an injunction be granted, it must be a limited one, as in *Fetherstonhaugh* v. *Hagarty* (1).

Jellett, K.C., in reply :—

The defendant is a trespasser by the wire fencing, and an action lies for an injunction : *Fitzgerald* v. *Firbank* (2) ; *Smith* v. *Giddy* (3) ; *Ecroyd* v. *Coulthard* (4).

Here there is an exclusive right in the plaintiff of fishing in a non-navigable river, and the effect of the erection of this wire paling is to prevent him exercising this right of fishing altogether. It must be shown that this fence is reasonably necessary for the proper cultivation of defendant's farm to entitle him to succeed. The farm has been for half a century in defendant's family, and there has been practically no fence in this place during that time. Possibly, in 1872, some sort of fence was put up there, but it did not remain long; and the evidence shows that for the past twenty-five years, at all events, there has been no fence in this place. Therefore, from the user of the farm there is nothing to show that this fence is ordinarily necessary for its working. An owner of sporting rights cannot prevent what is reasonably necessary for the proper cultivation of the land over which he has such right, *e.g.* he cannot prevent the proper pruning of trees, as in *Gearns* v. *Baker* (5).

March 25.

BARTON, J. :—

The defendant is the judicial tenant of a farm on the banks of the River Dee in county Louth. On the occasion of the fixing of the fair rent by the Land Commission, the sporting rights were

(1) 3 L. R. Ir. 150.
(2) [1897] 2 Ch. 96.
(3) [1904] 2 K. B. 448.
(4) [1898] 2 Ch. 358.
(5) L. R. 10 Ch. 355.

exclusively reserved to the landlord. The river is a salmon and trout river; and the usual and proper way of fishing the river appears to be to fish it from the bank with bait or fly. In fact, I infer from the evidence that the right of fishing could not reasonably be exercised in any other way. The plaintiff is the landlord's nephew, and is the grantee from him by a deed dated April 18th, 1891, of his exclusive right of fishing. The plaintiff has for many years fished the river, and for the last fifteen years has fished it every season year by year. He was never interrupted in the exercise of his right of fishing until the close of the season of 1903. Up to that time he had never seen any paling or other obstruction on defendant's lands along the river-bank. Opposite to one part of defendant's lands there is a salmon-pool. At this point defendant, in June, 1903, erected a barbed wire paling 130 yards long. It was erected so as to leave, between the barbed wire paling and the river-bank, a narrow space varying in width from 4 feet to 9 inches. The plaintiff complains of this barbed wire paling as a wrongful obstruction to his right of fishing, and asks the Court to restrain the defendant from keeping it erected.

I cannot doubt upon the evidence that this paling—placed where it is, and constructed as it is of barbed wire—not merely obstructs, but practically prevents all reasonable exercise of plaintiff's right of fishing at this place. It would be well-nigh impossible for the most agile of fishermen to hook, gaff, and land a salmon while that barbed wire paling is in that position on the bank of the river. He could hardly do so without being subjected to the constant risk not merely of tearing his clothes, but of serious injury to his hands, legs, and body generally. On behalf of the defendant it is said that the river is shallow, and the river-bank broken in some places; and that this paling was put up for the purpose of preventing escape and trespass of cattle. If this paling was reasonably necessary, and was erected *bona fide* for a purpose of that kind, the defendant would, in my opinion, be in a very strong position. The right of fishing must be exercised in view of the occupying tenant's right to use all proper and reasonable means which may be necessary from time to time for the management and cultivation of his farm. In cases of this kind, two rights in *eodem solo* have to be reconciled—the tenant's right to manage and

Barton, J. 1905.

BOYLE v. HOLCROFT.

cultivate his farm in all proper and reasonable ways consistent with the conditions of his tenancy, and the landlord's right of fishing and of entering upon the lands for that purpose. It may be that in some cases, as was suggested in the course of the argument, the landlord's remedy might take the form of the removal of an obstruction, making amends or compensation, in accordance with section 5 of the Land Act, 1881, for any damage occasioned thereby; but it has not been contended that a remedy of that kind would fit this case. I take it that, as a general rule, so long as the tenant is *bona fide* and reasonably managing and using the lands, the owner of the fishing rights must be content to exercise his right upon the lands in the condition in which they may happen to be from time to time. On the other hand, the tenant must not, under cover of farm user or management, unreasonably or *mala fide* cause or maintain an obstruction to the exercise of the right of fishing, and may be restrained by injunction from doing so.

Was this barbed wire paling erected in the *bona fide* and reasonable exercise by the defendant of his rights as occupying tenant of the lands? So far as the defendant's purpose was to prevent escape or trespass of cattle where the river was shallow and the river-bank broken, that purpose was a proper one; and if this had been an ordinary paling, a different question would have been raised, before deciding which I might, perhaps, have required some further evidence and argument. But why was barbed wire used at this particular place? It was not suggested by any witness that it was used, or that at this particular place it was useful, for any farming purpose. The defendant, who is the legal owner of the farm, but does not manage it, suggested that it was used because it was the only kind of wire available at the time. His brother, who is the beneficial owner of the farm, and really works and manages it, gave a different explanation. He said, when he was pressed upon the point, that he apprehended that some children might come and ride astride upon the paling, and that he used barbed wire so as to prevent them from doing so. I am unable to accept that explanation seriously, or to treat it as a reasonable one. As regards internal fences, a farmer's or landowner's motive or reason for the use of barbed wire is, as a general rule, his own

affair; and, when the legal rights of third parties are not affected, does not concern others. But this particular barbed wire paling was placed so as to make it a constant source of physical danger to any person who might be exercising this right of fishing in the only way in which it could be reasonably exercised. The defendant having adopted a kind of paling which prevents the exercise of a legal right, questions of motive and reasonableness become legitimate subjects of inquiry. There was evidence pointing to a personal *animus* against the plaintiff, and to an attitude of hostility to his exclusive right of fishing, which cannot be left out of consideration upon the question of *bona fides*. This paling was not erected until after the defendant had been prosecuted by the plaintiff for fishing at this place, and had incurred imprisonment on that account. His brother, the beneficial tenant of the farm, had on a former occasion been fined at Petty Sessions for a similar reason. The principal witness for defendant admitted, with apparent pride, that he was an expert poacher of this river, and went so far as to offer to initiate the cross-examining counsel into the mysteries of that art. An atmosphere of opposition to fishing rights in general, and in particular to plaintiff's fishing right, permeated the evidence upon defendant's side. The element of personal *animus* has significance when taken in connection with the absence of any adequate explanation of the use of barbed wire at this place.

It is not necessary for me to decide whether the burden of proof upon the issues of *bona fides* and reasonableness rested upon the plaintiff or upon the defendant. I leave that question to be settled in some case in which the merits may be more evenly balanced, and the inference to be drawn from the evidence less clear. Whichever way the burden falls, the plaintiff in the present case is, in my opinion, entitled to an injunction.

The following will be the order of the Court:—

"THE COURT doth declare that the barbed wire paling, which is the paling referred to in the third paragraph of the statement of claim, was erected by the defendant, his workmen or servants, so as to obstruct and prevent the reasonable exercise by plaintiff of his right of fishing, mentioned in the first paragraph of the statement of claim; and that same was not erected in the *bona fide* or reason-

Barton, J.
1905.
BOYLE
v.
HOLCROFT.

able exercise by defendant of any of his rights as tenant of said lands. And, accordingly, it is ordered that an injunction do issue to restrain the defendant, his agents, servants, or workmen, from erecting, or keeping erected, the said barbed wire paling, or any similar obstruction to plaintiff's said right, save only in so far as same may be the necessary result of the *bona fide* and reasonable exercise by defendant of his right, as the tenant of said lands, in the proper cultivation and management thereof."

Solicitor for the plaintiff: *Dickie.*
Solicitor for the defendant: *M'Iver.*

J. MACM.

Barton, J.
1905.
Mar. 20, 30.

DOYLE *v.* CREAN.

(1905. No. 212.)

Settlement—Failure of trusts—Marriage portion—Resulting trust.

A father, on the marriage of his daughter, C., paid over to the trustees of the settlement a sum of £800, upon trust for the husband and his wife, C., for their lives and the survivor for life, with remainder to the children of the marriage; and if the wife should die leaving the husband surviving, and there being no children, to pay said sum to the husband. The father also covenanted, after securing to each of his children not yet provided for a like sum of £800, to dispose of the residue of his property, so that, on the death of himself and his wife, it should be divided equally among his surviving children, and the share of the said C. should be and enure to the like trusts, intents, and purposes, as were expressed concerning said sum of £800. In the event of the husband not surviving C., and there being no issue (which happened), there was no trust expressly declared in the settlement concerning the trust property.

By his will the father bequeathed the residue of his property in accordance with the terms of the covenant:—

Held, that the £800 should be regarded as a marriage portion, given by the father to his daughter C. on her marriage, as a provision for her, and that C. took both the £800 and the share of her father's residue absolutely, there being a resulting trust in her favour.

Ward v. *Dyas* (Ll. & G. *temp.* Sugden, 177) followed.

ORIGINATING SUMMONS.

By an indenture of marriage settlement, dated 17th October, 1870, and made between Robert Joseph Crean, of the first part,

Catherine Sheridan, otherwise Crean, daughter of said Robert Joseph Crean, of the second part, Michael Joseph Sheridan, of the third part, and Patrick C. Sheridan and William Nicholas Roice, of the fourth part, being the settlement executed on the marriage of said Catherine Crean and Michael Joseph Sheridan, a sum of £800, paid to the said Patrick C. Sheridan and William Nicholas Roice, was settled upon Michael Joseph Sheridan and Catherine Sheridan for their lives, and for the survivor during his or her life, and after the decease of such survivor in trust for the children of the marriage; and if Catherine Sheridan should die leaving Michael Joseph Sheridan surviving, and there being no children of said marriage, to pay and apply the said sum to Michael Joseph Sheridan. The settlement also contained a covenant on the part of Robert Joseph Crean, with Patrick C. Sheridan and William Nicholas Roice, to the following effect: —"And the said Robert Joseph Crean doth hereby covenant, promise, and agree, to and with the said Patrick Charles Sheridan and William Nicholas Roice, their executors, administrators, and assigns, in manner following, that is to say, that after paying to or securing for each of his children that have not yet been provided for a like sum of £800, he shall dispose of the residue of his property both real and personal, of every nature and kind whatsoever, either by deed or by his last will and testament duly executed, so that upon the decease of them the said Robert Joseph Crean, and Anne E. Crean (his wife), his trustees or executors, having realised his estate, shall divide its produce amongst his then surviving children equally, and the amount which shall come to the share of the said Catherine Crean shall be and enure to the like uses, trusts, intents, and purposes as are hereby expressed of and concerning the said sum of £800."

Mrs. Anne E. Crean died in the lifetime of Robert Joseph Crean.

Robert Joseph Crean died on 13th March, 1883, and by his will, dated 17th August, 1878, after certain devises and bequests therein mentioned, bequeathed all his National Bank shares, moneys that he might have at his death, house property, and all the description of property he died possessed of, after certain payments therein mentioned, to be equally divided among his children and

Barton, J. 1905.

DOYLE v. CREAN.

the issue of his deceased children therein named, including the said Catherine Sheridan.

In a suit for the administration of the real and personal estate of Robert Joseph Crean, instituted on the 14th May, 1884, the share of Catherine Sheridan under this will was ascertained at £2169 0*s.* 3*d.*, and was transferred to the separate credit of the Rev. Patrick Charles Sheridan, surviving trustee, and the new trustee, when appointed, of said settlement of 17th October, 1870, William Nicholas Roice, the other trustee, having died on 27th July, 1878.

By an indenture of 11th November, 1889, Rev. Luke Doyle was appointed a trustee of said settlement, and the said sum was paid over to the Rev. Patrick Charles Sheridan and Rev. Luke Doyle.

Michael Joseph Sheridan died on the 9th August, 1904, leaving Catherine Sheridan him surviving. There was no issue of the marriage. This event was not expressly provided for in the settlement.

Rev. Patrick Sheridan died on 29th June, 1899, and by an indenture of 3rd March, 1905, the stocks, funds, and securities, subject to the trusts of the settlement of 17th October, 1870, were transferred into the names of Rev. Luke Doyle and Michael A. Ennis, as trustees of said settlement.

The present summons was taken out by the aforesaid trustees to have the question determined whether, in the events which had happened, there was a resulting trust in the funds comprised in said settlement to Catherine Sheridan absolutely or to the settlor.

D. F. Browne, K.C., for the plaintiffs :—

So far as the £800 is concerned, the matter is absolutely clear. The money was actually parted with to the trustees, and must be regarded as intended for a marriage portion. Consequently, the trusts declared in the settlement having failed, there is a resulting trust to the daughter, Catherine Sheridan, and not to the settlor: *Ward* v. *Dyas* (1). The words of the covenant declaring that the money to be paid over under it was to enure to the like trusts, intents, and purposes as were expressed concerning the £800, show

(1) Ll. & G. *temp.* Sugden, 177.

that the two funds stand in the same position. In the event of the death of her husband in her lifetime and failure of issue, it was unnecessary to give an absolute estate to Catherine, as the gift to her was by way of marriage portion. *In re Nash's Settlement* (1) seems inconsistent with *Ward* v. *Dyas* (2); but the latter case was not cited; and it was carefully provided in the former case that the husband was only to take a life estate, not as here, where it is provided that the husband, in the event of his surviving his wife and in default of issue, was to take absolutely. Where there is an absolute gift, and a particular mode of enjoyment is pointed out which fails, the absolute gift prevails: see *Olphert* v. *Olphert* (3), where the cases on the subject are collected.

Molony, K.C., for the defendant, the executor of settlor's will:—

The whole question is whether this is an absolute gift, or merely a gift for the purposes of the settlement. If the settlor says that the gift is to be a marriage portion for his daughter, it is an irrevocable gift; and on failure of the trusts, there will be a resulting trust to the daughter. That is the extent of the decision in *Ward* v. *Dyas* (2), although that view was not taken by Kay, J., in *In re Nash's Settlement* (1). Here the words "marriage portion" do not occur; and there is only a dedication of the funds to the trusts of the settlement, on failure of which there is consequently a resulting trust to the settlor. It is carefully provided that in certain events the husband was to have an absolute estate, and the absence of such a provision in the case of the wife shows an intention on the part of the settlor merely to give her a life estate.

March 30.

BARTON, J.:—

This summons is brought for the determination of a question arising in the administration of the trusts of a settlement, dated October 17, 1870, and made in contemplation of a marriage then intended and shortly afterwards solemnized between Michael Joseph Sheridan and Catherine Crean, daughter of Robert Joseph Crean.

(1) 51 L. J., Ch. 511; 46 L. T. 97; 30 W. R. 406.
(2) Ll. & G. *temp.* Sugden, 177.
(3) [1903] 1 I. R. 326.

Barton, J. 1905. DOYLE v. CREAN.

The parties to the settlement were Robert Joseph Crean, of the first part, his daughter, Catherine Crean, of the second part, Michael Joseph Sheridan, of the third part, and the trustees, of the fourth part. The settlement recited the intended marriage between Catherine Crean and Michael Joseph Sheridan, and that it had been agreed that Robert Joseph Crean should pay to the trustees the sum of £800 for the uses, intents, and purposes thereinafter declared. It was then witnessed that, in pursuance of the said agreement and in consideration of the intended marriage, Robert Joseph Crean had paid to the trustees the said sum of £800 upon trust for Robert Joseph Crean until the marriage, and after the marriage to invest and pay the annual dividends or interest to the husband and wife for their lives and the survivor of them for his or her life; and after the death of the survivor, for the children of the marriage, as the wife should by her last will appoint; and in default of appointment, amongst the children equally, or if only one child, to such one; and if the wife should die leaving the husband surviving, and there being no children, to pay and apply the said sum to the husband. Then follows a covenant by Robert Joseph Crean with the trustees that "after paying or securing for each of his children not yet provided for a like sum of £800," he would dispose of the residue of his property real and personal by deed or will, so that (after the death of himself and his wife) the trustees and executors of his will having realized his estate should divide the produce amongst his then surviving children equally, and the amount that should come to the share of Catherine Crean should be and enure to the like uses, trusts, intents, and purposes as were being expressed of and concerning the said sum of £800.

On the occasion of the marriage Robert Joseph Crean paid the £800 to the trustees of the settlement. Afterwards he duly carried out the intention which had been expressed in the covenant. He paid or secured for each of his children not yet provided for a like sum of £800; and by his will, dated August 17, 1878, after certain devises and bequests therein mentioned, he bequeathed all the residue of his property to be equally divided among his children (including Catherine), and the issue of his deceased children. He died on March 23, 1883. His estate was

the subject of an administration action, in the course of which Catherine's share of this residuary bequest was ascertained as £2169 0*s.* 3*d.*, and the sum so ascertained was transferred to a separate credit. In due course, this sum of £2169 0*s.* 3*d.* was paid out to the trustees of the settlement of 1870.

Accordingly, this summons relates to two sums of money—viz. the £800 originally paid in 1870 by Robert Joseph Crean to the trustees of his daughter's settlement on the occasion of her marriage; and the £2169 0*s.* 3*d.* which was transferred to the trustees after Robert Joseph Crean's death as Catherine's ascertained share of the residuary bequest in his will. The event which has happened is that Catherine has survived her husband, there having been no issue of the marriage. That event is not provided for in the settlement by any express limitation. It is contended on the one side that, subject to the life-interest of Catherine, there is a resulting trust of both these sums to the estate of her father Robert J. Crean; while it is contended on the other side that the £800 should be regarded as a marriage portion, and that Mrs. Catherine Sheridan as donee of the £800, and as legatee of the £2169 0*s.* 3*d.*, should be regarded as the true settlor of these moneys. In that view of the case, the resulting trust would be to her.

A case in point is *Ward* v. *Dyas* (1). In that case a father, on the occasion of the marriage of his daughter Mary, covenanted to pay to the trustees of the settlement a sum of £500 to be vested in them for the uses of the settlement. The settlement did not provide by any express limitation for the event which afterwards happened, which was that the wife survived her husband, there having been no issue of the marriage. It was contended that there was a resulting trust for the personal representative of her father. Lord St. Leonards—then Sir E. Sugden—dealt with the case as follows. He said:—

"The question simply is, whether the father of this young lady gave her £500 as a marriage portion; or whether he dedicated this sum to certain trusts only, so as to leave the interest undisposed of as a resulting trust to himself. There is, undoubtedly, a resulting trust, so far as the whole is not exhausted by the trusts of the settlement; but the question is, for whom? If you consider

(1) Ll. & G. *temp.* Sugden, 177.

Barton, J. 1905. DOYLE v. CREAN.

it merely as a dedication of the £500 to the uses of the settlement, then there is a resulting trust for the father. But if this sum is considered as a marriage portion, it is clear that there is a resulting trust for the daughter to whom the portion is given. My opinion is that the £500 is to be considered as a portion. . . . If it had been paid, there could have been no doubt that it was a marriage portion, which signifies a sum of money transferred from a parent to a child on marriage, and what is not disposed of will result to the child . . . I must consider this, in common parlance, a handing over of the £500 by the father to his daughter; but inasmuch as he had not the money ready, he covenants to pay it. I consider it as a sum of money provided for the daughter, and as the uses of the settlement have not exhausted the whole interest in this sum, what has not been exhausted remains with the daughter, and she is the person entitled to it."

In *Ward* v. *Dyas* (1) the words "marriage portion" were used in the settlement in reference to the £500; but there is no magic in the descriptive word, if the sense can be collected from the whole instrument. If I can find in any part of this settlement a clear indication that the money paid by the father to the trustees on the occasion of his daughter's marriage was, according to his intention and in the contemplation of the parties, a gift to her and a provision for her, I am not compelled by the doctrine of resulting trusts to defeat that intention. On the contrary, I can, in entire accordance with the principles regulating resulting trusts, give effect to the intention, as Lord St. Leonards did in *Ward* v. *Dyas* (1).

Accordingly, I ask myself this question—Have we in this settlement any sufficient indication of an intention that this £800 was to be a gift to, or a provision for, the daughter? I do not find in the recitals or in the *testatum* anything definite or conclusive upon the point; and I certainly do not feel at liberty to infer such an intention from the mere existence of the relation of parent and child. But I think that a sufficient indication of such an intention is afforded by the introductory words of the covenant by the father to bequeath a share of his residuary estate to his daughter. That covenant was an important part of the deed.

(1) I.l. & G. *temp.* Sugden, 177.

It contemplated bringing, and operated to bring, into settlement a much larger sum than the £800. It was prefaced by words which seem to me to let in light upon Robert J. Crean's intentions towards his children generally, and in particular upon his intentions towards Catherine as regards this £800. The covenant runs that, "After paying or securing for each of his children that have not yet been provided for a like sum of £800, he shall dispose," etc. Do not these words, when taken in connexion with the preceding provisions of the deed, involve a statement by Robert J. Crean that he had already provided for some of his children, that he was by the payment of this £800 providing for his daughter Catherine, and that he intended to provide for his remaining children by paying or securing for them a like sum of £800? Did he not say in so many words that by the payment of this £800 to the trustees of her marriage settlement he was doing for Catherine what he either had done or intended to do for his other children, *i.e.* that he was providing for her? In my opinion, the prefatory words of this covenant sufficiently indicate that the £800 was intended by Robert J. Crean, and regarded by the other parties to the settlement as a sum of money paid as a provision for his daughter Catherine. I feel certain that, if I were to hold that there is a resulting trust as to this £800 in favour of Catherine's brothers and sisters, as residuary legatees of their father's estate, I should be defeating the sufficiently expressed intention of Robert J. Crean, that this £800 was, subject to the trusts of the settlement, to be a gift to and provision for Catherine. This view serves to explain other parts of the settlement. If the £800 was intended to be her marriage portion, and was given to her as a father's provision for his child, the absence of any limitation in the settlement, providing for the event of her surviving her husband leaving no issue, becomes quite intelligible. The money would, in that view of the case, be "at home," or, as Sir E. Sugden put it, would "remain with" her.

When we come to consider the larger sum of £2167 0*s.* 3*d.*, the case becomes clearer. Robert J. Crean covenanted to dispose of the residue of his property, either by deed or will, so that upon the death of the survivor of himself and his wife, his trustees or executors, having realised his estate, should "divide" the produce

Barton, J. 1905. DOYLE v. CREAN.

amongst his then surviving children equally, and that the amount thereof which should come to "the share of the said Catherine Crean" should be and enure to the trusts of the settlement. This covenant could not fully operate until after the death of Robert Joseph Crean. In that event Catherine would be bound to do all things necessary for giving effect to the covenant to which she was a party. But the property would, before its transference to the trusts of the settlement, be the beneficial property of Catherine as one of the residuary legatees under her father's will. The covenant contemplated that the trustees and executors should separate, or at all events assent to the separation of, her share before it was to go and enure to the trusts of the settlement. It seems to me that the settlor of the money was in the contemplation of the parties to be, and in fact was, Mrs. Catherine Sheridan herself. The resulting trust must accordingly be to her.

Mr. Molony referred to *In re Nash's Settlement* (1). In that case the husband survived the wife and died. No appointment was made of the trust fund by either husband or wife; and the remainder in default of appointment to the children was void for remoteness. Consequently there was a failure of the trusts. The question for decision was whether the trust funds resulted to the estate of the wife's father or passed to the estate of the husband who had been the personal representative of the wife. Kay, J., held that there was a resulting trust to the father's estate. He found nothing in the settlement to show an intention to give the money to the wife as a provision for her. In that respect the case differs from the present one. He also laid stress upon other circumstances not to be found in the present case. In cases of this kind the question is mainly one of the construction of the particular settlement in question. I am not prepared to say that there is any necessary inconsistency between the decisions in *In re Nash's Settlement* (1) and *Ward* v. *Dyas* (2), respectively.

At all events, I am content to follow and apply *Ward* v. *Dyas* (2). The broad view, so clearly expressed by Lord St. Leonards in that case, seems to me to have a direct application to the present case. That view comes from a very high authority. Properly under-

(1) 51 L. J., Ch. 511; 46 L. T. 97; 30 W. R. 406.
(2) Ll. & G. *temp.* Sugden, 177.

stood, it does not appear to conflict with, but rather to conform to, the principles which govern resulting trusts; because it proceeds upon the basis that the daughter, not the father, should be regarded as the true settlor of the trust fund. Accordingly, I shall hold that Mrs. Sheridan is now absolutely entitled to these two sums of £800 and £2169 0*s.* 3*d.*

Barton, J. 1905. DOYLE v. CREAN.

Solicitors for the plaintiff: *M. J. O'Connor & Son.*
Solicitors for the defendant: *O'Flaherty & Son.*

J. MAC M.

IN THE MATTER OF THE ESTATE OF RICHARD WALSH, OWNER; GEORGE GREENWOOD AND RICHARD MONTRAY DRURY, PETITIONERS; AND IN THE MATTER OF THE ESTATE OF RICHARD WALSH, CONTINUED IN THE NAMES OF JAMES WALSH AND WALTER WALSH, AS ADMINISTRATORS, AND IN THE NAME OF THE SAID JAMES WALSH AS HEIR-AT-LAW, OF THE SAID RICHARD WALSH, OWNER; THE HIBERNIAN BANK, LIMITED, PETITIONERS; CONSOLIDATED WITH IN THE MATTER OF THE ESTATE OF RICHARD WALSH, CONTINUED AS ABOVE, OWNER; THE COMMISSIONERS OF PUBLIC WORKS, PETITIONERS.

Ross, J. 1905. Feb. 22, 28.

Settlement—Construction—Life estate and remainder in fee to husband—Gift over on insolvency or alienation—Effect of.

By a marriage settlement the husband's lands were settled upon trust, to pay to him the rents, &c., during the term of his natural life, "except in the events hereinafter stated"; and after his death, subject to an annuity for his wife, upon trust for the husband. The wife's lands were settled upon trust, to pay the rents to her for her life, and after her death, in case her husband should survive her and leave children of the marriage living (which event happened), upon trust to pay the rents to the husband during his life, "except in the events hereinafter provided"; and after the death of the survivor, upon trust for the children of the marriage, as the husband and wife should jointly appoint; and in default thereof, in equal shares. The settlement contained a proviso that in case the husband should, during the lifetime of his wife or any of the children, incumber the lands, or become bankrupt or insolvent, the lands should remain vested in the trustees, upon trust for the wife for life, and after her death in trust for the children of the marriage, as

Ross, J. 1905.

In re WALSH'S ESTATE.

was thereinbefore expressed concerning the wife's lands. There were several children of the marriage. The husband carried an arrangement with his creditors. Part of the husband's property included in the settlement was the sub-lessee's interest in the lands of B., held for lives renewable for ever, and also the lands of M., held in fee-simple. The husband purchased the interest of the sub-lessor, and accepted a fee-farm grant from the head lessor. The husband mortgaged to the Hibernian Bank his interest in B. and M.:—

Held, that in the events which happened, the gift over took effect, not only as regarded the life estate, but also as regarded the estate in remainder.

APPLICATION on behalf of the Hibernian Bank, Limited, the petitioners in the second matter, for an order that the carriage of the proceedings in the first matter be transferred to them, and that, if necessary, the first matter be consolidated with the second matter.

By an indenture, dated the 1st July, 1853, and made between Richard Walsh, of the one part, and Mary Walsh, of the other part, reciting that Mary Walsh was entitled to a sum of £1200 out of the assets of her father which remained in the hands of Richard Walsh, and reciting that Richard Walsh was, under an indenture of lease, dated the 8th May, 1788, entitled to an estate in freehold in the lands of Brownsbarn and Fortunestown, in the barony of Newcastle and county of Dublin, containing 57A. 2R. 11P., and also entitled under another lease to a freehold estate in other parts of Brownsbarn, containing 130 acres, and also entitled to an estate in fee-simple in that part of the Commons of Baldaniel, called Monienalion, in the same barony and county, containing 30 acres, Richard Walsh granted to Mary Walsh an annuity of £75, charged on these several lands. This annuity was redeemable for £1200.

By his marriage settlement, also executed on the 1st July, 1853, upon the occasion of his marriage with Catherine Coyle, reciting that Richard Walsh was entitled to the lessee's interests for lives renewable for ever in the lands of Brownsbarn and Fortunestown, and to an estate of inheritance in the lands of Monienalion, and to a chattel interest in the lands of Fodeens under the will of his father, and reciting that Catherine Coyle was entitled to certain other lands, Richard Walsh granted and assigned to the trustees of the settlement his several lands upon the trust (after the

solemnization of the marriage) to pay the rents, issues, and profits thereof to Richard Walsh and his assigns during the term of his natural life *except in the events hereinafter stated*, and from and after his death to pay an annuity of £50 thereout to Catherine Coyle, and subject thereto to hold the same to the use of Richard Walsh, his heirs, executors, administrators, and assigns; and by the same settlement the lands to which Catherine Coyle was entitled were granted to the trustees upon trust to pay the rents, issues, and profits to Catherine Coyle and her assigns for life, and after her death in case Richard Walsh should survive her and there should be one or more children of the marriage then living, upon trust to pay the rents, issues, and profits, to Richard Walsh and his assigns during his life *except in the events hereinafter provided*, and after the death of the survivor of them upon trust for the children of the marriage as Richard Walsh and Catherine Coyle should jointly appoint, and in default thereof as the survivor should appoint, and in default of such appointment, upon trust for the children of the marriage in equal shares. The settlement contained a proviso that if Richard Walsh should at any time thereafter during the lifetime of Catherine Coyle, or during the lifetime of any child or children of them, alien, charge, or incumber the said thereby granted and assigned lands, or any part thereof, or become bankrupt or insolvent, or permit a writ of execution to be issued against him whereby his interest therein should be liable to be attached or disposed of, or do any act whereby the rents, issues, and profits, or annual produce of the several lands and premises or any part thereof, if payable to himself, would become vested or payable in some other person or persons, then and in any or either of such cases, the thereby granted and assigned lands, and the issues and profits thereof, should remain and be vested in the trustees upon trust to pay the rents, issues, and profits, and annual produce thereof to Catherine Coyle, if she should be living, and her assigns, but if she should at such time or times, and in such event as last thereinbefore contemplated, be dead, then, and in such case, to pay or apply the same to or for the use and benefit of the child or children issue of the said intended marriage in such manner and form as was thereinbefore expressed and declared of and concerning the lands settled by Catherine Coyle

Ross, J. 1905. *In re* WALSH'S ESTATE.

in case of the death of the survivor of Richard Walsh and her, and there being issue of the marriage then living, anything therein to the contrary notwithstanding.

The marriage between Richard Walsh and Catherine Coyle was subsequently solemnized, and there were issue thereof nine children. The original lease for lives renewable for ever of the lands of Brownsbarn and Fortunestown of the 8th of May, 1788, was made by Richard Dowdall to Timothy O'Brien and Thomas Mulcahy. Richard Dowdall held these lands under a superior lease for lives renewable for ever, dated the 29th of May, 1770, and made by Thomas Morgan to Patrick Mulligan. Patrick Mulligan's interest became vested in Thomas Whistler, from whom Richard Walsh purchased it in 1857. Thomas Morgan's interest vested in St. Patrick's Hospital, who, on the 3rd of February, 1874, executed a fee-farm grant to Richard Walsh. On the 7th of February, 1878, Richard Walsh mortgaged (amongst other lands) the lands of Brownsbarn and Fortunestown, containing 72 acres Irish, and the lands of Monienalion, to the Hibernian Bank. On the 21st of February, 1893, George Greenwood and Richard Montray Drury, in whom the annuity of £75 was vested, filed a petition for the sale of the lands charged therewith, therein stated to be held under the renewable lease of the 8th of May, 1788; on the 14th of April, 1874, the Hibernian Bank presented a petition for the sale of, amongst other lands, the interest of Richard Walsh in the lands of Brownsbarn and Fortunestown, held under the fee-farm grant of the 3rd of February, 1874, and Monienalion.

In the year 1893 Richard Walsh carried an arrangement with his creditors. He died in 1903. Mrs. Walsh also died. The petitioners in the first-mentioned petition not proceeding with it, the Hibernian Bank applied for carriage of the proceedings; and upon the hearing of the motion, the question as to the validity of the Hibernian Bank's mortgage was raised.

Pierce Nolan, for the Hibernian Bank:—

The mortgage to the Bank affects the reversion in fee of the lands included in the settlement. A man cannot limit a fee-simple to himself and take away his power to alien it; he may create a life estate determinable on bankruptcy, but the reversion in fee is

not affected by the bankruptcy: Goodeaves' Law of Real Property, 3rd ed., p. 108. The terms of the settlement as to alienation only apply to the life estate, and not to the reversion in fee: *Higinbotham* v. *Holme* (1); *In re Detmold; Detmold* v. *Detmold* (2); *Dean* v. *Dean* (3); Elphinstone's Introduction to Conveyancing, 5th edition, p. 339.

Charles A. O'Connor, K.C., for James Walsh, one of the sons of Richard Walsh, and incumbrancers:—

This is not a gift of a life estate with a clause of forfeiture, but an estate for life except in certain events, and consequently is not void: *In re Dugdale; Dugdale* v. *Dugdale* (4); *Brandon* v. *Robinson* (5); *Webb* v. *Grace* (6); *Rochford* v. *Hackman* (7); *Joel* v. *Mills* (8).

I submit that, upon alienation to the Bank, the life estate of Richard Walsh and the reversion in fee passed away from him, and never came back.

Nolan, in reply:—

In all the cases cited on the other side the property was settled by the will or settlement of some other party; here Richard Walsh was himself the settlor.

Ross, J:— Feb. 28.

This is an application on behalf of the Hibernian Bank for the consolidation of three separate matters, and for carriage of the consolidated proceedings.

There is one serious question of law, and that alone is the subject of my present decision.

The Bank claims on foot of a mortgage made by Richard Walsh, the owner in 1878, to the Hibernian Joint Stock Company, now the Hibernian Bank.

The present trustees of the marriage settlement of the owner

(1) 19 Ves. 87.
(2) 40 Ch. D. 585.
(3) [1891] 3 Ch. 150.
(4) 38 Ch. D. 176.
(5) 18 Ves. 429.
(6) 2 Ph. 701.
(7) 9 Hare, 475.
(8) 3 K. & J. 458.

Ross, J.
1905
In re WALSH'S ESTATE.

challenge the mortgage as void, on the ground that the owner had ceased to be the owner of the property he proposed to charge.

The settlement was made on the 1st July, 1853, and the trusts of it affected the wife's property, and also the husband's property.

The trusts relating to the husband's land were briefly as follows:—To pay the rents and profits or permit the same to be received by the husband during the term of his natural life, "except in the events hereinafter stated"—from his decease to pay an annuity of £50 to his wife, and subject thereto to the use of Richard Walsh absolutely.

The trusts of the wife's land were to herself for life; in case her husband survived her, to him for life, "except in the events hereinafter mentioned"; and then follows a trust for the benefit of the children of the marriage.

We find the events alluded to in a proviso to the effect that these presents are on the express condition that if the husband, during the life of his wife, or that of any of his children, alien, charge, or incumber, the lands or become bankrupt or insolvent, or do anything whereby the land would become vested in some other person, then it is declared that the lands, and the issues and profits thereof, should be vested in the trustees on trust to pay the rents to the wife, if she should be living; and in case she should be dead, then to apply the rents and profits for the benefit of the children in the same manner as was declared concerning the wife's lands.

There were several children of the marriage; the wife is dead, and the husband at one time was insolvent.

It is contended on behalf of the Bank that the clause restraining the owner from alienation is repugnant to the nature of the estate he took under the settlement, and that it is therefore inoperative; that at most it could only determine his life estate, and that the ultimate remainder in him took effect, and is subject to the charge created by their mortgage. The elementary law is that liability to alienation is an incident to an estate, and any attempt to deprive it of that incident is inoperative—or as Littleton (p. 222) puts it, "If a feoffment be made upon this condition that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath

power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him from all power which the law gives him, which should be against reason, and, therefore, such condition is void." For instance, where there is an unqualified limitation to A and his heirs, provided he does not sell or incumber the lands, in which case it is to pass to B, A takes an absolute estate, and the proviso in favour of B is void.

But the case in law is very different when we have a limitation of an estate to A for his life *until* he becomes bankrupt or attempts to alien it, and then to B.

In the latter case we have not an unqualified grant in the first instance, but the interest granted is less than a life estate, and is to be construed as a limitation to A during his life or until he attempts to alien, and upon that event or upon his death it passes to B. This the law allows, A having only a determinable life estate. In the numerous cases the distinctions are very fine, but the principles are well settled.

In *Rochford* v. *Hackman* (1) two rules are mentioned :—

1. Property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift.

2. Though a life interest may be expressed to be given, it may be well determined by an apt limitation over.

We must now turn to this settlement and determine under which class the present case falls.

In this settlement the income is to be received by Richard Walsh during the term of his natural life, except in the events hereinafter stated. Now, the events hereinafter stated are the events mentioned in the proviso, that is to say, alienation, bankruptcy, and such like. The except clause shows that he does not get in the first instance an unqualified life estate, but only a determinable life estate.

The words of Kay, J., in *Dugdale* v. *Dugdale* (2), are quite in point. There are cases cited by him which, he says, "decide that if real or personal estate be given to A for life with remainder to B, absolutely, with a proviso that if A should attempt to assign, his

(1) 9 Hare, 475. (2) 38 Ch. D. 176.

Ross, J. 1905.

In re Walsh's Estate.

life estate should cease, such a proviso is read as a limitation to A during his life or until he should attempt to assign; and upon that event, or after his death, over, and such a limitation is held to be valid."

I am therefore of opinion that on the occurrence of the event the owner's life estate determined, and the trusts in favour of the children took effect.

At the close of the argument it was suggested on behalf of the Bank that the except clause was to be read in connexion with the life estate only, and not in connexion with the ultimate remainder in the owner. This contention cannot prevail. All that follow the words "from and after the decease of the said Richard Walsh" presuppose the death of the owner without the occurrence of any of the events mentioned in the proviso. This is made clear by the terms of the proviso in the occurrence of any of the events. The rents and profits are to remain and be vested in the trustees for the benefit of the wife and children as provided.

Solicitors for the Hibernian Bank: *D. & T. Fitzgerald.*
Solicitors for James Walsh: *Maxwell & Weldon.*

W. C. S.

CARLISLE *v.* COOKE.

M. R.
1904.
Nov. 14.

Will—Construction—Executors—Real estate—Implied power of sale—Intention of testator.

After bequeathing a pecuniary legacy, and directing its investment, a testator provided as follows:—"I will and bequeath all the remainder of my property in lands, . . . together with chattels, stock, shares, furniture, and personal effects, to my brothers and sisters, or their representatives, in equal shares."

Testator, after naming the beneficiaries and indicating their shares, appointed two persons who were not beneficiaries under his will "to be my executors, to carry out the intention of this my last will and testament":—

Held, that the executors were given by the will an implied power of sale over the real estate.

By his will, dated July 21, 1882, Robert Nevin provided as follows:—"I will and dispose of and bequeath to the Reformed Presbyterian Congregation of Ballyclubber the sum of £200 sterling, to be invested by my executors, Mr. James Carlisle and Mr. Thomas Cooke, as trustees, and the interest of said sum of £200 to be given annually to aid the stipend of the congregation, and in the event of one of the above said trustees dying, I direct that at a congregational meeting of the Ballyclubber congregation a new trustee be appointed, and whenever my future trustee dies, then the vacancy be filled up in the same way. Second, I will and bequeath all the remainder of my property in lands, namely, my farm in Kilmoyle, my farm in Ballyholme, and my farm in Park, and my farm in Lisnabraugh, together with chattels, stock, shares, furniture, and personal effects, to my brothers and sisters, or their representatives, to be divided among them in equal shares, that is to say, one-fourth part of said remainder to my sister, Mary Cooke, wife of Mr. Robert Cooke, Fountain Hill, Londonderry; one fourth part of said remainder to my brother, Hugh Nevin, of New York, United States, America; one-fourth part of said remainder to the children of my sister, the late Sarah Anne Nevin, wife of Mr. James Nevin, of Carnaff, county Antrim,

M. R. 1904.

CARLISLE v. COOKE.

to be equally divided amongst them, and one-fourth part of said remainder to Matilda Carlisle, wife of Mr. James Carlisle, of Lisnarick, county Antrim. I will and appoint Mr. James Carlisle, of Lisnarick, county Antrim, and also Mr. Thomas Cooke, of Fountain Hill, Londonderry, to be my executors to carry out the intention of this my last will and testament."

The testator, Robert Nevin, died on the 9th January, 1883, and probate of his will was granted to the executors therein named on the 5th March, 1883.

At the date of his death the testator was seised and possessed of certain lands in the townlands of Ballyholme, West Park, and Lisnabraugh. The lands of Ballyholme, containing 27A. 3R. 30P., were held under fee-farm grant, dated the 8th March, 1881, and these lands were in the possession of the executors.

The lands of West Park, containing 28A. 3R. 28P., were held, with other lands, under a lease for lives renewable for ever, dated 11th August, 1755, and were let to tenants. The lands of Lisnabraugh, containing 26A. 1R. 4P., were held under lease for lives renewable for ever, and these lands were also let to tenants.

Since the death of Robert Nevin his executors had been in possession of the rents and profits of the lands previously mentioned, and had been dividing the same in accordance with the directions in the will, and they were now desirous of selling the lands. The beneficiaries, under the testator's will, entitled to share in the lands or the proceeds thereof were very numerous, and some of them were infants. The question arising for decision was whether on the construction of the will the executors had an implied power of sale of the lands of Ballyholme, West Park, and Lisnabraugh.

R. D. Megaw, for the plaintiffs, the executors of the will :—

The principle that governs such cases as the present is that laid down by Parke, B., in *Doe* v. *Hughes* (1), and referred to in Farwell on Powers (1893), p. 72. If, from the whole purview of the will it appears to have been the intention of the testator that his real estate should be sold and the proceeds are to be distributed in such a manner as the executors alone can by law

(1) 6 Ex. 223.

carry out, there is an implied power given to them to sell the real estate. In the present case, though there is no devise to the executors, a blended fund of realty and personalty is "to be divided among" certain persons in equal shares, and there is an express direction to the executors "to carry out the intention" of the will. The intention cannot be carried out without a sale. [He cited *Tylden* v. *Hyde* (1); *Mower* v. *Orr* (2); *Davies to Jones and Evans* (3).]

Robert M'Ilroy, for the defendants, referred to *Flux* v. *Best* (4), and supported the contention that the executors had a power of sale.

THE MASTER OF THE ROLLS:—

I do not think there is much difficulty about the construction of this will. The first thing the testator does is to give £200 as a legacy, and he directs how it is to be invested, and then he goes on to say:—"Second, I will and bequeath all the remainder of my property in lands" (setting them out), "together with chattels, stocks, shares, furniture, and personal effects, to my brothers and sisters, or their representatives, to be divided among them in equal shares." The will does not give a direction to anyone "to divide among them," nor do I think it would make much difference if it did. At first it struck me that there might be a distinction between the present case and *Davies to Jones and Evans* (3). In this case there is a direct gift of the whole of testator's property in lands and personal effects to individuals, that is, to persons beneficially entitled; but I think that, in substance, the same thing exists in the English case, and therefore it is not distinguishable on that ground. The entire residue of this blended fund (the whole is made one blended fund) is to be divided, and, if so, by somebody. It is true that a great part of it consists of real estate. So far as the lands are concerned, the executors cannot carry out the intention of the testator unless they take an implied power of sale. It is quite obvious that the intention of the testator cannot

(1) 2 Sim. & Stu. 238.
(2) 7 Hare, 473.
(3) 24 Ch. D. 190.
(4) 23 W. R. 228.

M. R. 1904. CARLISLE *v.* COOKE.

be carried out without a sale, and there is no person who could sell except the executors or the beneficiaries, of whom there are perhaps forty or fifty, some of them being infants. The division of the property is the principal object which the testator had in view; and the intention of his will was obviously that somebody must carrry out that intention. He directs the executors "to carry out the intention of this my last will," and as a sale is necessary to carry out that intention, the executors are the persons to sell.

The answer to the question will therefore be in the affirmative.

Solicitor for the plaintiffs: *R. C. Martin.*
Solicitors for the defendants: *Bennett & Glover.*

R. W. L.

Barton, J. 1905. Mar. 28, 30.

KINGAN *v.* MATIER.

(1905. No. 253.)

Marriage settlement—Covenant to settle after-acquired property—Gift from husband to wife.

By a marriage settlement, dated the 9th November, 1883, it was agreed that if the intended wife then was, or if, during the intended coverture, she or her intended husband in her right should, at one time and from one source, become entitled to property of the value of £100 or upwards, except jewels, &c., the intended husband and wife would do all things necessary for vesting the same in the trustees of the settlement, upon the trusts thereby declared of certain property of the intended wife. In 1903 the husband, for a nominal consideration, transferred certain shares, exceeding £100 in value, in a limited company to his wife.

Held, that these shares were not bound by the settlement.

Coles v. *Coles* ([1901] 1 Ch. 711) followed and applied.

ORIGINATING SUMMONS.

By a settlement under the Infant Settlements Act, 1855, dated the 9th November, 1883, and made in contemplation of the marriage of Alexander Saunderson Matier and Emma Louisa Reid (an infant), certain money funds of the said E. L. Reid were

settled upon trust for her during the joint lives of herself and the said A. S. Matier for her separate use without power of anticipation, for the survivor for life, and then for the issue of the marriage, with usual ultimate trusts for her appointees, executors, or next-of-kin; and the said A. S. Matier assigned to the trustees a policy of insurance on his life upon the trusts declared of the said money funds, or as near thereto as circumstances would permit, save that the ultimate trust was for the said A. S. Matier.

The deed then provided:—"And it is hereby agreed that if the said Emma Louisa Reid now is, or if, during the said intended coverture, she, or the said Alexander Saunderson Matier, in her right shall at one time, and from one source, become seised or possessed of, or entitled to, any real or personal property of the value of £100 or upwards, for any estate or interest, except jewels, plate, personal ornaments, or chattels of a similar nature, which it is hereby agreed shall belong to the said Emma Louisa Reid for her separate use, then and in every such case the said Alexander Saunderson Matier and Emma Louisa Reid and all other necessary parties shall, at the cost of the trust estate, and as soon as circumstances will admit, do all such acts and things as shall be necessary or expedient for effectually vesting the same in the said trustees," upon trust that they should, in such manner as they should think fit (but as to reversionary property not until it should fall into possession, &c.), convert into money so much thereof as should not consist of money, &c., or of an annuity or other interest determinable with the life of E. L. Reid, and should hold the moneys produced thereby and so much of the property as should consist of money, &c., upon the trusts declared of the said money funds, and to pay any such annuity, &c., to the persons to whom the income of the said trust premises should be applicable; "And it is hereby declared that it shall be lawful for the said trustees to settle and ascertain in such manner as they shall deem expedient the amount of any moneys, properties, or effects due to or to which the said Emma Louisa Reid or the said Alexander Saunderson Matier in her right may at any time become entitled, and also to pass and allow the accounts of the persons paying over or transferring the same moneys, properties, or effects, respectively, or any part thereof, respectively, which the said trustees shall deem it expedient to

Barton, J. 1905.

KINGAN v. MATIER

accept such part in lieu of, or in satisfaction for, the whole, and generally to adjust, settle, and approve all accounts in relation to the trust premises, and to execute and do all releases and things relating to the said trust premises as fully and effectually as if they were absolute owners."

On the 26th February, 1903, Alexander Saunderson Matier, in consideration of 10*s*., transferred to his wife 500 fully paid 6 per cent. preference shares of £10 each in Henry Matier & Co., Limited, and same were registered in her name in the Company's register of shareholders.

A. S. Matier died on the 28th August, 1903.

This was a summons taken out in the matter of the trusts of the settlement by the trustees, as plaintiffs, against Emma Louisa Matier and the executors of the will of A. S. Matier, as defendants, to have it determined whether the plaintiffs were entitled to have the said shares transferred to them on the trusts of the settlement, or whether E. L. Matier was entitled to the same absolutely.

Herbert Wilson, K.C., for the plaintiffs:—

Whether property subsequently given falls within a covenant to settle depends on the construction of the covenant: the Court must first construe the covenant, and then determine whether the gift comes within it, and if it does, no intention of the donor can prevent the operation of the covenant: *Scholfield* v. *Spooner* (1), and the judgments there (pages 101, 102), of Bowen and Fry, L.JJ. An earlier case, *In re Mainwaring's Settlement* (2), would seem to be a decision to the contrary; but the real effect of the decision there is explained by Chitty, J., in *In re Allnutt* (3), and his observations are approved of by Fry, L.J., in *Scholfield* v. *Spooner* (1), at page 103.

The decision in *Dickinson* v. *Dillwyn* (4) was founded on another principle—that the covenant, though not so expressly limited, applied only to property acquired during the coverture. *Carter* v. *Carter* (5) is to the same effect, and both of those cases were approved of in *In re Edwards* (6). In the latest case on the

(1) 26 Ch. D. 94.
(2) L. R. 2 Eq. 487.
(3) 22 Ch. D. 275.
(4) L. R. 8 Eq. 546.
(5) *Ibid.* 551.
(6) L. R. 9 Ch. 97.

subject, *Coles* v. *Coles* (1), there was no covenant, and the question arose as to the effect of a recital and an assignment of property, present and future. Joyce, J., thought it doubtful whether after-acquired property was intended to be included, and his decision was founded on *Dickinson* v. *Dillwyn* (2). Moreover that decision is not binding on this Court. A married woman is now in the same position as her husband with respect to property, and could it be said that a covenant by a husband to settle future property would not apply to property given to him by his wife? The settlement here was after the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) came into force; that Act has removed the necessity for protecting a wife's property against her husband, and accordingly there is no reason for restricting the generality of the covenant.

William M. Jellett, K.C., for Mrs. Matier:—

The Court is asked to hold, for the first time, that a gift from a husband to his wife comes within a covenant to settle after-acquired property. There is no authority for that contention, and the cases cited do not support it. The origin of such a covenant was to prevent the wife's property going to the husband in his marital right; and since the Married Women's Property Act, 1882, the only object of such a covenant can be to prevent the effect of marital influence. The covenant generally affects only property acquired during the coverture—the object being to protect it against the husband—and such a covenant would be meaningless as applied to a gift from the husband himself. As to the diminished necessity now for such a covenant, see Lush, Husband and Wife (2nd ed.), 514. Here at the time of the settlement the Act had not long been in force, and the old forms of settlements had not yet been modified to suit the new state of the law. The covenant itself shows that protection from the husband was the object: it is confined to property acquired during the coverture; it extends to property which the husband in his wife's right should become entitled to, and he is to join in vesting it in the trustees. All this shows that property in which the husband would have

(1) [1901] 1 Ch. 711. (2) L. R. 8 Eq. 546.

Barton, J. 1905. KINGAN v. MATIER.

some interest was contemplated, and the effect of the covenant should be restricted by the object: see *Dickinson* v. *Dillwyn* (1); *Carter* v. *Carter* (2). In *Dickinson* v. *Dillwyn* (1), Sir R. Malins, V.-C., says (page 550):—"... Besides this, it may be said that there is the gross improbability of its being intended to apply to property which the husband might choose to give to his wife"; and he decides the first question before him in these words:—"On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband." *Coles* v. *Coles* (3) is an express decision on the very point in question here. Joyce, J., there (page 714) says that he decides that case upon the grounds stated by Malins, V.-C., in *Dickinson* v. *Dillwyn* (1), and he quotes the second of the above passages from his judgment. The transfer of the shares was an advancement to Mrs. Matier: *In re Eykyn's Trusts* (4).

S. L. Brown, K.C., for A. S. Matier's executors.

Wilson, K.C., in reply:—

The covenant is disjunctive: it applies to property to which the wife or the husband in her right shall become entitled. The conclusion of the passage in Lush shows that in some cases such a covenant should still be inserted.

March 30.

BARTON, J.:—

It appears that Alexander S. Matier and Emma Louisa Reid were married in November, 1883. The settlement, dated November 9th, 1883, executed in contemplation of their marriage, contained a covenant to settle the intended wife's after-acquired property. Alexander S. Matier died on the 28th August, 1903. On the 26th February, 1903, he had transferred to his wife, for the nominal consideration of 10*s.*, 500 fully paid-up shares of £10 each in A. S. Matier & Co., and the same were registered in her name in the Company's register of shareholders. The question

(1) L. R. 8 Eq. 546.
(2) *Ibid.* 551.
(3) [1901] 1 Ch. 711.
(4) 6 Ch. D. 115, 118.

arises whether this gift of shares from the husband to the wife is caught by the covenant to settle after-acquired property, or whether Mrs. Matier is entitled to the shares absolutely.

In cases of this kind, regard must be had to the language and purpose of the particular covenant in question, and in connexion therewith to the circumstances of the particular transaction in question. Accordingly, we must look at the language and purpose of this particular covenant in order to ascertain whether it was intended by the parties that the wife should be bound to bring into settlement property given to her by her husband. The settlement was made in 1883, but the covenant is not a covenant by the wife alone. If it had been in that form, the claim of the trustees to have this property transferred to them might, perhaps, in view of the date of the settlement, be more difficult to meet. I express no opinion upon a form of covenant which is not before me. This covenant is framed in an old and familiar form, and its subject-matter is any property to which "during the coverture she, or the said Alexander S. Matier, in her right shall" become entitled. In the operative words of the covenant, it is provided that "the said Alexander S. Matier and Emma Louisa Reid, &c., shall" do all things necessary to vest the property in the trustees. In settlements, dated before 1883, the primary, although not the exclusive, purpose of covenants of this kind was considered to be, as Sir W. M. James, L.J., said in *In re Edwards* (1), to prevent the future property of the wife "falling under the sole control of the husband."

This settlement was, however, executed after the coming into operation of the Act of 1882, which, by section 2, in respect of the wife's personal property, practically abolished the *jus mariti* during coverture; and it was suggested in the course of the argument that, having regard to the date of the settlement, the protection of the wife's property from the husband should not be regarded as having been aimed at by the covenant. I am not disposed to take that view. I am disposed to think it more probable that the old form was deliberately adopted for the old purpose by a cautious draftsman. After the passing of the Married Women's Property

(1) L. R. 9 Ch. 97.

Barton, J. 1905. KINGAN *v.* MATIER.

Act, 1882, there was room for uncertainty as to the construction which might be put upon some of the provisions of the Act—*e.g.* as to the extent to which sect. 19 of the Act might be held to preserve the previous law of settlements, and as to the view which might be taken by the Courts about the separate property created by the Act. These questions exercised the minds of lawyers of that day; and the last word has not been said about them. Accordingly, even since 1882, where the parties have had in view the purpose of protecting the wife from marital control, it has been thought safer by some conveyancers to frame a wife's covenant to settle her after-acquired property in the old form—joining the husband and inserting the words "or the husband in her right." (See Key and Elphinstone's Precedents, 8th ed., vol. 2, p. 512 n., and *cf.* Vaizey, Settlements, p. 236.) This settlement was made under the sanction of the Court of Chancery; and, having regard to its form, I think it reasonable to suppose that it was *pro majore cautelâ* framed in the old form for the old purpose, *i.e.* to make sure of the exclusion of the marital control, and to bind any interest which the husband might possibly be held to take in the wife's property falling within the covenant. It is not necessary for me to discuss the question whether such a precaution was or is necessary. If that was the primary purpose of this covenant, it seems highly improbable that it was intended to include in the covenant property *bona fide* given by the husband to the wife; and it seems very doubtful whether, if the language of the covenant be reasonably construed in the light of its primary purpose, such a gift comes within the true meaning of that language.

I confess, however, that, apart from authority, I might have felt difficulty in holding that this acquisition of property by Mrs. Matier did not come within the literal terms of her covenant. But any doubt which I may have entertained has been removed by a consideration of the authorities. Indeed, I think the case may almost be said to be covered by authority. It was long ago well settled that property acquired by a wife under a bequest from her husband did not come within a covenant such as this one, even where the covenant was not limited to the period of coverture, and, therefore, if construed literally, would apply to such property.

That was decided by Malins, V.-C., in *Dickinson* v. *Dillwyn* (1) and in *Carter* v. *Carter* (2), and by the Court of Chancery Appeal in *In re Edwards* (3). One of the reasons given by Malins, V.-C., was the extreme improbability that the parties to the covenant had intended to include within its scope property acquired by the wife from the husband. Recently the question whether a gift from a husband to a wife during coverture was caught by a settlement came before Joyce, J., in *Coles* v. *Coles* (4). In that case the settlement was inaccurately and loosely framed. There was no express covenant to settle after-acquired property; but there was an assignment to the trustees of all the wife's property "both present and expectant or future vested or contingent." If the learned Judge had rested his decision upon the particular form of the settlement, the case might not have a direct bearing upon the present case. But after alluding to the peculiar form of the settlement, Joyce, J., proceeded as follows:—"The result is that I think it doubtful whether this assignment was intended to include after-acquired property; but I decide this case upon the grounds stated by Malins, V.-C., in his judgment in *Dickinson* v. *Dillwyn* (1), where he says: 'On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband.'"

It appears to me that the reason of Joyce, J.'s judgment in *Coles* v. *Coles* (4) applies to the present case; and I shall follow that decision. Accordingly I shall answer the question which has been submitted to the Court by saying that Mrs. Matier is entitled to these shares absolutely.

Solicitors for the plaintiffs: *Carson & M'Dowell.*
Solicitors for Mrs. Matier: *L'Estrange & Brett.*
Solicitor for the executors of A. S. Matier: *R. A. Howe.*

D. M'C. M.

(1) L. R. 8 Eq. 546.
(2) *Ibid.* 551.
(3) L. R. 9 Ch. 97.
(4) [1901] 1 Ch. 711.

M. R.
1904.
Dec. 13, 14, 21.
1905.
Jan. 20.

In re O'FLANAGAN and RYAN'S CONTRACT.

(1904. No. 6084.)

Vendor and purchaser — Conditions of sale — Condition stating defect of title — Will — Bequest to wife in trust — Delegation of trust.

A condition of sale of leasehold premises stated that a testator, by his will, bequeathed the premises to his wife, in trust for herself and her children, to be applied by her as she should deem most expedient, and that, to give effect to the trusts contained in the will, the widow, on her re-marriage, conveyed the premises to trustees, upon trust, by sale or mortgage, to raise £1000 for the benefit of the said children, and that, in pursuance of this trust for sale, the vendors were selling and would convey the premises as trustees, and not otherwise, and should not be bound to procure the concurrence of any other parties. The will contained no provision authorising this to be done. The purchaser refused to complete, on the ground that a good title had not been shown, as the widow had no power to delegate her trust. The vendors relied on the condition:—

Held, that the widow committed a breach of trust by assigning the premises to trustees, and that the purchaser was not precluded by the condition from objecting to the title on this ground, inasmuch as he was entitled to assume that a power to do what was done by the widow would be shown.

Summons.

This was an application under the Vendor and Purchaser Act, 1874, by the vendors in the matter of a contract, dated November 5th, 1904, between Patrick O'Flanagan and Martin Rahill, as vendors, and Patrick Ryan, as purchaser, for the sale of a licensed house and premises at Thurles, county Tipperary, asking for a declaration that a good title had been shown in accordance with the particulars and conditions of sale.

The facts of the case were as follows:—The premises were described in the particulars as the licensed shop, dwelling-house, and premises, situate at Castle-avenue, otherwise New Road, in the town of Thurles, barony of Eliogarty, and county of Tipperary, held under lease for the term of sixty years, from May 1st, 1881, at the yearly rent of £45.

That was decided by Malins, V.-C., in *Dickinson* v. *Dillwyn* (1) and in *Carter* v. *Carter* (2), and by the Court of Chancery Appeal in *In re Edwards* (3). One of the reasons given by Malins, V.-C., was the extreme improbability that the parties to the covenant had intended to include within its scope property acquired by the wife from the husband. Recently the question whether a gift from a husband to a wife during coverture was caught by a settlement came before Joyce, J., in *Coles* v. *Coles* (4). In that case the settlement was inaccurately and loosely framed. There was no express covenant to settle after-acquired property; but there was an assignment to the trustees of all the wife's property "both present and expectant or future vested or contingent." If the learned Judge had rested his decision upon the particular form of the settlement, the case might not have a direct bearing upon the present case. But after alluding to the peculiar form of the settlement, Joyce, J., proceeded as follows:—"The result is that I think it doubtful whether this assignment was intended to include after-acquired property; but I decide this case upon the grounds stated by Malins, V.-C., in his judgment in *Dickinson* v. *Dillwyn* (1), where he says: 'On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband.'"

It appears to me that the reason of Joyce, J.'s judgment in *Coles* v. *Coles* (4) applies to the present case; and I shall follow that decision. Accordingly I shall answer the question which has been submitted to the Court by saying that Mrs. Matier is entitled to these shares absolutely.

Solicitors for the plaintiffs: *Carson & M'Dowell.*
Solicitors for Mrs. Matier: *L'Estrange & Brett.*
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D. M'C. M.

(1) L. R. 8 Eq. 546.
(2) *Ibid.* 551.
(3) L. R. 9 Ch. 97.
(4) [1901] 1 Ch. 711.

M. R.
1904.
Dec. 13, 14, 21.
1905.
Jan. 20.

In re O'FLANAGAN and RYAN'S CONTRACT.

(1904. No. 6084.)

Vendor and purchaser—Conditions of sale—Condition stating defect of title—Will—Bequest to wife in trust—Delegation of trust.

A condition of sale of leasehold premises stated that a testator, by his will, bequeathed the premises to his wife, in trust for herself and her children, to be applied by her as she should deem most expedient, and that, to give effect to the trusts contained in the will, the widow, on her re-marriage, conveyed the premises to trustees, upon trust, by sale or mortgage, to raise £1000 for the benefit of the said children, and that, in pursuance of this trust for sale, the vendors were selling and would convey the premises as trustees, and not otherwise, and should not be bound to procure the concurrence of any other parties. The will contained no provision authorising this to be done. The purchaser refused to complete, on the ground that a good title had not been shown, as the widow had no power to delegate her trust. The vendors relied on the condition:—

Held, that the widow committed a breach of trust by assigning the premises to trustees, and that the purchaser was not precluded by the condition from objecting to the title on this ground, inasmuch as he was entitled to assume that a power to do what was done by the widow would be shown.

Summons.

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The facts of the case were as follows:—The premises were described in the particulars as the licensed shop, dwelling-house, and premises, situate at Castle-avenue, otherwise New Road, in the town of Thurles, barony of Eliogarty, and county of Tipperary, held under lease for the term of sixty years, from May 1st, 1881, at the yearly rent of £45.

The lease was dated January 11th, 1884, and made by the National Bank, Ltd., to James Ryan. The premises afterwards became vested in Wm. Maher, of Thurles, merchant. Wm. Maher, by his will, dated February 7th, 1890, bequeathed his property as follows:—"I bequeath my house, stock, furniture, money, and debts, and all my other means and effects whatsoever, to my wife, Kate Maher, in trust for herself, and the children of our marriage, to be applied by her as she shall deem most expedient, subject to the sum of £200, which I bequeath to my son Richard Maher, the surviving child of my first marriage, and will that the said sum be paid to him when he shall have attained the age of twenty-one years; and in the event of my said son Richard Maher dying before the age of twenty-one years is attained by him, I will that the said sum of £200 be retained by my wife in trust as aforesaid; and I further will that my son Richard be supported and educated, like the rest of my children, until he is twenty-one years of age, as a member of the family, and I appoint my wife and James Scully executors of this my will.

William Maher died on February 7th, 1890, and his will was proved on March 15th, 1890, by his widow, Kate Maher. By indenture of November 5th, 1890, Charles Culhane, the maternal uncle of the said Richard Maher, and Edward Ryan, indemnified Kate Maher from any obligation to the said Richard Maher, arising under the will of the said William Maher, she having previously paid to the said Charles Culhane the sum of £200, in satisfaction of the legacy bequeathed to him by his father, and the sum of £30 in lieu of maintenance under the said will.

By indenture of marriage settlement, dated January 23rd, 1891, made between the said Kate Maher of the first part, Patrick Rahill of the second part, and Patrick O'Flanagan and Martin Rahill of the third part, it was witnessed that, in consideration of a marriage intended between the said Patrick Rahill and the said Kate Maher, the said Kate Maher, with the approval of the said Patrick Rahill, assigned the said premises (*inter alia*) to the said Patrick O'Flanagan and Martin Rahill (therein called the trustees), to hold the said premises unto the said trustees, in trust for the said Kate Maher, until the said intended marriage, and thereafter on trust that they the said trustees, should, out of the said premises,

M. R. 1904.

In re O'Flanagan and Ryan's Contract.

raise by sale or mortgage the sum of £1000, to be invested by them in trust for the children of the first marriage of the said Kate Maher, namely, Patrick, Ellen, Mary, and John; the investments to be made in certain trust securities therein named, and the moneys to be invested for the said children in such shares as the said Kate Maher should appoint; and in default of appointment, amongst the said children equally on attaining the age of twenty-one years or marrying, and, subject to such sum of £1000 being raised, in trust for the said Patrick Rahill. The said indenture contained a covenant by the said Kate Maher and Patrick Rahill to pay the rent of the said premises, and to keep the said trustees indemnified against payment thereof.

Kate Maher afterwards married the said Patrick Rahill. The excise license attached to the premises was in her name. The premises were put up for sale by auction and purchased by Patrick Ryan, on November 5th, 1904, for the sum of £700. He paid a deposit of £210 to the auctioneer, and a commission of £35, and signed an agreement on the same day, acknowledging that he had purchased from Patrick O'Flanagan and Martin Rahill, the vendors, by public auction, the premises mentioned in the annexed particulars for the sum of £700, subject to the conditions of sale, also annexed thereto, and agreed to pay the remaining sum of £525 to the vendors' solicitor on or before a specified day of November, 1904.

On November 9th, 1904, the conditions of sale and abstract of title were furnished by the vendors' solicitor to the purchaser's solicitor. Condition 4 provided that the vendors should, at their own expense, furnish an abstract of title, and, subject to these conditions of sale, deduce a good title to the premises. Condition 5 required the purchaser to admit that William Maher was assignee of the lease, and tenant of the premises under it, at the time of his death. Condition 6 was as follows:—"By his will the said William Maher bequeathed (*inter alia*) the said premises to his wife in trust for herself and their children, to be applied as she should deem most expedient. To give effect to the trusts contained in the said will, Mrs. Maher, on the occasion of her re-marriage, vested (*inter alia*) the said premises in trust to raise by sale or mortgage the sum of £1000 for the benefit of the said

children; and in pursuance of this trust for sale, the vendors are now selling the said premises, and shall convey the same to the purchaser in their character as trustees and not otherwise, and shall not be bound to obtain the concurrence of any other parties to such conveyance as conveying parties. Condition 7 provided that no objection should be taken as to the legacy of £200, but no point was raised as to it.

On November 14th, 1904, the purchaser's solicitor informed the vendors' solicitor that the purchaser declined to complete the sale, on the ground that good title to the premises had not been shown by the vendors in accordance with the conditions of sale, but did not make any specific requisition or objection. On November 25th, 1904, the vendors' solicitor, without prejudice to the vendors' rights to rely strictly on the conditions of sale, informed the purchaser's solicitor that Mrs. Rahill was ready, if required, to join the vendors in conveying the premises to the purchaser, but the purchaser, notwithstanding, declined to complete, and this application was made to the Court accordingly.

Herbert Wilson, K.C. (*Carrigan* with him), in support of the summons:—

The sixth condition binds the purchaser, even if the title is bad: *In re Scott and Alvarez's Contract* (1). The gift to the wife is like that in *Crockett* v. *Crockett* (2).

P. D. Fleming, K.C. (*P. Lynch* with him), for the purchaser:—

Mrs. Maher had no power to convey the premises to the vendors. She was either entitled for life, with a trust to maintain the children and a power to appoint to them: *Crockett* v. *Crockett* (2); or she took concurrently with the children, as joint tenant or tenant in common: *Newill* v. *Newill* (3). As executrix she could sell or mortgage the property for purposes of administration; but could not deal with it for her own benefit. She committed a breach of trust by delegating her trust to others. The deed was made under suspicious circumstances. The condition of sale does not preclude the purchaser from showing that the title is bad. [He referred to

(1) [1895] 2 Ch. 603. (2) 2 Ph. 461. (3) L. R. 7 Ch. 253.

M. R. 1904.

In re O'Flanagan and Ryan's Contract.

Scott v. *Tyler* (1); *Watkins* v. *Cheek* (2); Williams on Executors, 10th ed., p. 702.]

Herbert Wilson, K.C., in reply:—

Perhaps there was a technical delegation of her trust by Mrs. Maher, but £1000 was segregated, and she offered to join in the conveyance. By the deed, she only gave the trustees a power of sale. The condition states the defect of title, and precludes the purchaser from requiring the concurrence of any other parties.

Dec. 21.

The Master of the Rolls:—

This is a summons under the Vendor and Purchaser Act brought by the vendors, asking that it may be declared that a good title has been shown, in accordance with the particulars and conditions of sale, to the premises mentioned in the summons, a licensed house and premises, at Thurles, in the county Tipperary. I shall take the will and deed under which the premises are held as read.

The gift to the widow of the testator is "in trust for herself and the children of our marriage, to be applied by her as she shall deem most expedient." Whatever may be the exact effect of these words, it is clear that some trust is imposed upon the widow, and that she is thus a trustee for herself and the children of the marriage, though with wide discretionary powers. The case is not like *Lambe* v. *Eames* (3), for there is a trust; nor *Haley's Trusts* (4), for the widow takes some beneficial interest. (In that case the majority of the Court of Appeal held that the legatee took none, though it was not necessary to decide that point, as she died before the testator.) Perhaps it most closely resembles *Crockett* v. *Crockett* (5). At any rate it is clear that there is a trust; and that the *cestuis que trustent* are the widow and the children of the marriage, and no one else. It is possible, too, that, as the shares (when settled on) could only be worked out by a sale of the property and distribution of the proceeds, the widow, who is also executrix, may have an implied power of sale. I think that

(1) 2 Dick. 725.
(2) 2 Sim. & Stu. 205.
(3) L. R. 6 Ch. 597.
(4) 23 L. R. Ir. 130.
(5) 2 Ph. 461.

this is so. Obviously, however, any such sale ought to be made in perfect good faith for the benefit of the class interested, and no one else. What took place in 1891, on the occasion of the second marriage of Mrs. Maher, was not a sale; nor was it authorised by anything in the will. Mrs. Maher had no right to convey away the assets to any delegated trustee. Had she died soon after the execution of the deed of 23rd January, 1891, all the assets would have vested in a stranger, subject only to £1000 charged on them for the children, and to £200 left to the son of the testator's first marriage. The transaction was apparently entered into not for the benefit of the entire class, but for her own benefit mainly if not exclusively by securing for her a second husband. It is not necessary, nor would it be proper, to decide this, but it is needful to refer to it as, at least, an extremely serious difficulty in the way of upholding the transaction, even if it were not plain, as it is, that Mrs. Maher had no right whatever to assign away her trust and the trust estate. Indeed her doing so was in fact a complete breach of trust, independently altogether of the question whether a provision of £1000 for the children was under the circumstances a *bona fide* discharge of her duty to exercise, as trustee, an impartial discretion. The vendors claiming under the deed could give no valid discharge for the property of the minors; and the offer made subsequent to the sale to procure Mrs. Maher's, or rather Mrs. Rahill's, concurrence in the conveyance to the purchaser was no more than a proposal to obtain her ratification of her own improper dealings with the property. The purchaser would have to pay Patrick O'Flanagan and Martin Rahill for property which did not belong to them, and for which they could give no valid receipt. All this is plain and, in great part, admitted.

But Mr. Wilson's argument is that the purchaser is bound by the conditions of sale, so as to be precluded from raising the question, relying on *Scott* v. *Alvarez* (1) and cases of that character. But in *Scott* v. *Alvarez* (1), and all the decisions of similar import, the question has arisen upon the effect of positive restrictive conditions, in terms binding the purchaser to admit certain facts or to forego inquiry or investigation of title before a particular

(1) [1899] 2 Ch. 611.

M. R. 1904.

In re O'Flanagan and Ryan's Contract.

period or the like; whereas no such condition forms part of this contract. The only colour for this contention in the present case is the sixth condition, which is as follows:—"By his will the said William Maher bequeathed (*inter alia*) the said premises to his wife in trust for herself and her children to be applied as she should deem most expedient. To give effect to the trusts contained in the said will, Mrs. Maher, on the occasion of her re-marriage, vested (*inter alia*) the said premises in trust to raise by sale or mortgage the sum of £1000 for the benefit of the said children, and in pursuance of this trust for sale the vendors are now selling the said premises, and shall convey the same to the purchaser in their character as trustees and not otherwise, and shall not be bound to obtain the concurrence of any other parties to such conveyance as conveying parties."

This, it is said, fully states the facts, and informs the purchaser of what he is to buy; and as it discloses the title which the vendors are prepared to give, no objection founded upon those facts can be admitted. It states correctly enough the sentence of the will, in reference to the matter in hand, and it shows that title is to be made under the deed of 1891. If that title is bad, it is, at least, the title which alone the vendors are prepared to give, and thus the purchaser is precluded from raising the question.

In my opinion this argument is founded on a fallacy. A purchaser under such a condition is entitled to assume that he is getting a good title if it be possible consistently with what is stated that the title may be a good one; and it is plain that, consistently with what is stated, the title here might be a perfectly good one. He is told that the deed of 1891 was made "to give effect to the trusts contained in said will," and that by it Mrs. Maher "vested the premises in the vendors in trust," &c. Anyone reading that condition would be entitled to assume, and would assume, that there was some provision in the will, or in some other instrument of title, enabling Mrs. Maher to make a settlement on the occasion of a future marriage in the way stated; that the transaction in short was (as it is affirmed to be) a giving effect to the trusts of the will, and not a breach of them. When the will came to be examined, the purchaser would expect to find at least some power enabling

Mrs. Maher to appoint subsidiary trustees, with authority to give receipts for the purchase-money. Had this been the case, the difficulty would not have arisen. As it is, if the title were forced upon the purchaser, he would have to face the high probability that some of the children would raise the question against him at some future time, when, being fixed with notice of a breach of trust, he would or might be practically defenceless, being constructively a trustee for the persons entitled under the will, and bound to justify a transaction of the merits of which he would know nothing personally, and which is illegal on the face of it. The will contains no other provision, and no other authority is shown, enabling this thing to be done.

If, then, on the conditions of sale, he was entitled to assume that a power to do what was done would be shown, the meaning of that is that he was entitled to have this by the contract, and as he has not got it, a good title has not been shown pursuant to the conditions of sale.

There must be a declaration accordingly, and the vendors must pay the costs of the purchaser. If it is desired, I shall state on the face of the order that the deed of 1891 was a breach of trust. This will enable Mrs. Maher to call upon the trustees of that deed to re-convey the property to her, and place her in the same position as she was before.

1905. Jan. 20.

The order, which was made on January 20th, 1905, was as follows:—

> "THE JUDGE, being of opinion that the execution of the said indenture of settlement constituted a breach of trust on the part of the said Kate Maher, the settlor, who was a trustee under the said will of William Maher, doth declare that a good title has not been shown by the said vendors, in accordance with the said particulars and conditions of sale; and doth order that the said purchaser's costs of this application and order be paid to him by the said vendors, when taxed and ascertained."

Solicitor for the vendors: *John P. Carrigan.*
Solicitor for the purchaser: *J. L. Ryan.*

W. L.

FitzGerald, J.
1904.
Nov. 16.
1905.
March 30.

THOMAS F. NICHOLSON, Landlord; THOMAS WARING and HUGH SMYTH, Executors and Trustees of ROSS T. SMYTH, MRS. ALICE SMYTH, and JOHN BURNSIDE, Tenants.

Landlord and tenant—Ulster Tenant Right—Land Law (Ireland) Act, 1881, *ss.* 21, 57—Bona fide *occupation—Subletting—Compensation.*

The proviso in section 21 of the Land Law (Ireland) Act, 1881, enabling a person who would have been entitled to make a claim for Tenant Right, under sections 1 and 2 of the Land Act, 1870, if the holding had been held under a yearly tenancy, to do so on the termination of an existing lease, is not restricted to the case of a lessee in *bona fide* occupation of the holding.

A lawful subletting of part of a holding will not necessarily deprive a tenant of his right to compensation for Tenant Right, but in estimating the amount of compensation, regard is to be had to the fact that portion of the holding was not in the occupation of the tenant.

In estimating the amount of compensation for Tenant Right upon the expiration of a lease, it cannot be estimated on the basis of a rent less in amount than the rent payable under the lease, especially where the lessee was not in *bona fide* occupation of the entire holding at the expiration of the lease, and was consequently not entitled to have a fair rent fixed.

Appeal by the landlord from an order of His Honour the Recorder of Londonderry (1), by which £1360 was awarded to the tenants as the value of the Ulster Tenant Right on their being put out of possession of their holdings after the determination of a lease, dated 20th September, 1876, from Alexander Kennedy Skipton to Ross Thompson Smyth for twenty-one years, from the 1st November, 1875, at the rent of £157 8*s.* 7*d.* The facts of the case and the points raised by counsel are fully stated in the judgment delivered by Mr. Justice Fitz Gerald.

D. S. Henry, K.C., and *Bird*, for the landlord.

Wylie, K.C., and *Osborne*, for the tenants.

(1) Reported 36 I. L. T. R. 159.

FITZ GERALD, J.:—

FitzGerald, J.
1905.
NICHOLSON, *Landlord:* EXECUTORS OF SMYTH, *Tenants.*
March 30.

This is an appeal from the decision of the Recorder of Londonderry awarding £1360 to the tenants for the value of the Ulster Tenant Right on their disturbance in the possession of the holding by the landlord.

The holding consists of 130A. 3R. 30P., which was held under a lease of the 20th September, 1876, from Alexander Kennedy Skipton to Ross Thompson Smyth for twenty-one years, from the 1st November, 1875, at the yearly rent of £157 8*s.* 7*d.*

The earlier history of the holding, so far as it can be ascertained, is that on the 4th January, 1804, two leases were made by George Crookshank Skipton to John Acheson Smyth, the first of 8A. 3R. 4P. Cunningham measure, part of lands of Glenkeen and Ardmore, and also two houses in Glenkeen, as then in his possession, and the garden thereto adjoining, for a term of thirty-one years from the 1st November, 1803, at the rent of £18 4*s.*; and the second of part of the lands of Glenkeen, then or lately in the possession of Anne Donnell and John Brown, containing in all 46A. 0R. 32P. Cunningham measure, for a term of nineteen years from the 1st November, 1803, at the rent of £50.

The premises comprised in these two leases formed part of the present holding. No further leases appear to have been made until 1840, but it is suggested that the lessees remained on in possession as yearly tenants on the expiration of the leases of 1804.

On the 19th November, 1840, Connolly M'Causland Skipton made a lease to John Acheson Smyth of a farm of land at Ardmore, containing 30A. 0R. 39P. Cunningham measure, and of a farm of land at Glenkeen, containing 35A. 2R. 37P. Cunningham measure, for thirty-one years, at the rent of £83 9*s.* 5*d.* This lease contained a covenant against alienation.

It was stated at the hearing that this lease was surrendered and new lease granted in 1844 for a term of thirty-one years, from the 1st November, 1844.

This lease has not been handed in, but in the ejectment in 1875 the rent is stated as being £79 19*s.* 6*d.*; but the ejectment only deals with the farm at Ardmore, and does not refer to the farm at Glenkeen, containing 35A. 2R. 27P. Cunningham measure. Probably this is a mistake in the ejectment.

FitzGerald, J. 1905. NICHOLSON, *Landlord;* EXECUTORS OF SMYTH, *Tenants.*

On the 13th November, 1844, Connolly M'Causland Skipton also demised to Cary M'Clellan, in consideration of the surrender of a former lease of 1840 of the demised premises, and other the farm of land in Ardmore, containing 26A. 0R. 8P. Cunningham measure, and the farm of land in Ballyharkey, containing 12A. 3R. 10P. Cunningham measure, for thirty-one years, at the rent of £41 13*s.* 6*d.* This lease also contained a covenant against alienation.

The premises comprised in the two leases of 1844 form the present holding. The terms in the leases of 1844 having expired in 1875, the landlord after a demand of possession served two ejectments on the 7th December, 1875, and the tenants served two land claims alleging that in each case the lands were held by him subject to a usage that on the expiration of the lease the tenants were permitted to remain on in the holdings as tenant from year to year, or otherwise, subject to a fair rent.

In one case the tenant claimed £1,100 for breach of the usage, and in the other case £850.

Before the two land claims came on for hearing the two cases were settled upon the terms that the landlord should grant a new lease of the entire lands for a term of twenty-one years, at the rent of £157 8*s.* 7*d.*, and it was referred to Mr. (now Lord Justice) Holmes to settle, so that neither party should be prejudiced by the new lease, *i.e.* the tenants' claim to Tenant Right on the determination of a lease, and the landlord's claim that no such Tenant Right Custom existed on his estate.

Consequently Mr. Holmes put into the draft lease the following clause:—"Provided always, and it is hereby agreed, that the demise hereby made shall not prejudice or affect the right of the said Ross Thompson Smyth, his executors, administrators, or assigns, to make at the determination of this demise a claim for improvements under the provisions of the Landlord and Tenant Act, 1870, in respect of improvements made on the demised premises, not only during the continuance of this demise, but also made on the demised premises by the said Ross Thompson Smyth, or his predecessor in title, during the continuance of any leases or tenancies thereof heretofore in existence but now expired, it being the true intent and mean-

ing of the parties hereto, and it is hereby agreed that the said Ross Thompson Smyth, his executors, administrators, or assigns, shall, at the determination of this demise, be entitled to claim under the said Act for improvements made prior to the execution of these presents by himself or his predecessor in title, as if these presents did not create a new tenancy, but as if this demise was a continuation of the tenancy of the said Ross Thompson Smyth heretofore existing in said premises, and it is further agreed that the said Ross Thompson Smyth, his executors, administrators, or assigns, shall, at the determination of this demise, be entitled to make any further or other claim under the Land Act, either in substitution for, or in addition to, the said claim for improvements which the provisions of the said Act may entitle him to make."

The lease containing this provision is the lease of the 20th September, 1876, before referred to.

On the 16th January, 1878, Ross Thompson Smyth assigned to John Burnside 27A. 3R. 8P., portion of the holding, in consideration of £260, and subject to £30 proportion of the yearly rent of £157 8*s.* 7*d.*

On the determination of the lease of 1876, the conjoint tenant applied to fix a fair rent, but the Land Commission dismissed the application on the ground the tenant was not in *bona fide* occupation.

On the dismissal of the tenant's application, the landlord obtained possession of the holding, and is now in possession of same.

As appears from the judgment of Mr. Justice Meredith, the portions of the holding sublet at the date of the originating notice to fix the fair rent were:—(*a*) 4 acres, included in a lease of Larchmount House and grounds to a Mr. Lyle: Lyle died subsequently, and the lease was surrendered; (*b*) 4 acres included in a lease also to Mr. Lyle of a bleach green: after Lyle's death, the lease was sold to the landlord (Major Nicholson), who remained in possession, 1898–1900, and then sold the lease to a firm of bleachers; (*c*) 2A. 3R., with a house and forge, sublet to a man named Elliott, at £10 a-year; (*d*) 2R. 30P., with a cottage, held by Wall, at £4 a-year; (*e*) 1A. 1R. 10P., with a National School, held by Mrs. Forrest, at £6 a-year; (*f*) two cottier houses, set at rents producing £8 a-year.

FitzGerald, J. 1905.

NICHOLSON, *Landlord*; EXECUTORS OF SMYTH, *Tenants.*

In addition to these sublettings, 76 acres were set in conacre year by year by the tenant, and the only part of the holding which was in the physical occupation of the tenant were the 27A. 3R. 8P. assigned to Burnside, and 4A. 3R. 10P., two small fields which the tenant, Mrs. Smyth, had incorporated in her demesne and grounds of Ardmore, and also a few acres of plantation.

The landlord denies that any Ulster Tenant Right Custom is applicable to the present holding, it having been held under the two leases of 1844 previously to the lease of 1876, which contained covenants against alienation without the consent of the landlord.

At the determination in 1875 of the two leases of 1844, the custom claimed by the tenant was to remain on in the holding as yearly tenant or otherwise at a fair rent, and that, if his offer to do so was refused, to sell his Tenant Right subject to the existing rent or such *altered* rent as should not encroach upon the Tenant Right.

About the same time, that is to say in the year 1877, the landlord having served notice to quit upon some of the yearly tenants on the estate, these yearly tenants served claims for breach of the Tenant Right Custom, and the landlord in reply gave this notice to each such tenant: that he "did not dispute the right of the tenant to avail himself of the Tenant Right Custom, which has hitherto prevailed upon the Beachhill estate, *i.e.* to sell by private or public sale and subject to a fair and reasonable rent, and to the right of the landlord to object to the purchaser on the ground of character or solvency, the holding to be offered in the first instance to some one of the adjoining tenants on the said estate."

This shows of course that the Ulster Tenant Right did apply to yearly tenants on the Beechhill estate, which is the estate upon which the holding is situate; but no evidence has been produced to prove that it applied at the determination of a lease to the case of a holding which had been held under lease.

The Beechhill Estate being a very small estate, and if the holding now before the Court was, as stated by the landlord, Major Nicholson, the only holding on the estate held under lease, it would be obviously very difficult, if not almost impossible, to produce any direct evidence of leasehold Tenant Right on the estate.

But the tenant relies upon the provisions of the 21st section of the Land Act of 1881 as supplying the want of direct evidence of the existence of leasehold Tenant Right.

The 21st section says that all leases existing at the date of the passing of the Act shall remain in force to the same extent as if the Act had not been passed:—"Provided that at the expiration of such existing leases or such of them as shall expire within sixty years after the passing of this Act, the lessees, if *bona fide* in occupation of their holdings, shall be deemed to be tenants of present ordinary tenancies from year to year at the rents" under the leases.

It then goes on to say:—"On the termination of any such existing lease in any holding which, if it had been held from year to year, would have been subject to the Ulster Tenant Right Custom or any usage corresponding therewith, the person who would have been entitled to make a claim under the 1st or 2nd section of the Landlord and Tenant (Ireland) Act, 1870, in respect of the same holding, shall be entitled to do so, notwithstanding that the holding was held under any such lease; but this proviso shall not apply to leases in which there is contained a provision expressly excluding the Ulster Tenant Right Custom, or a usage corresponding therewith."

Now it appears to me that the words of the clause, if read in their ordinary signification, apply to the existing leases mentioned in the first paragraph of the section, and are not cut down or restricted by the subsequent proviso constituting the lessees of such leases, if in *bona fide* occupation of their holdings on the termination of the leases, tenants of present ordinary tenancies from year to year.

If the lessee is in *bona fide* occupation at the end of the lease, the effect of the section, according to the judgment of the Chief Baron in *Ireland* v. *Landy* (1), is to compel the tenant to remain in possession, and the landlord to elect to treat him as a tenant; but the clause in question refers to a claim to be made by the lessee on the termination of the lease, and not after he has been continued on as a tenant by virtue of the section.

If the clause was to be confined to the cases in which the

(1) 22 L. R. Ir. 422.

FitzGerald, J. 1905.

NICHOLSON, *Landlord;* EXECUTORS OF SMYTH, *Tenants.*

lessee was in *bona fide* occupation of the entire holding, then the only cases in which, under ordinary circumstances, a claim for compensation for Ulster Tenant Right could be made on the termination of the lease would be excluded from its operation.

There is no doubt some difficulty as to the meaning of the clause arising from the use of the word "holding" in the clause; under the 57th sect. of the Act "holding" during the continuance of a tenancy means a parcel of land held by a tenant who under the same section means a person occupying land under a contract of tenancy, but it is to be observed that these definitions are all subject to the first clause of the section, that they shall have the meaning assigned to them "unless there be something in the context repugnant thereto."

It appears to me, from what I have already said, that there would be something repugnant to the context in the clause in question if it was to be confined to the case of the leases in which the lessees were in *bona fide* occupation of the entire holding.

It is further to be observed that the word used in the clause as to the person who is to be benefited by its provisions is not "tenant," but "the person who would have been entitled to make a claim under the 1st or 2nd section of the Landlord and Tenant (Ireland) Act, 1870."

I, therefore, think that the clause in question supplies the necessary proof of Ulster Tenant Right Custom attaching to the holding on the termination of the lease, and notwithstanding the fact that it was held under lease.

Furthermore, I do not think that the existence of the covenant against alienation without the consent of the lessor in the leases of 1844 has any effect in depriving the tenant of his Tenant Right at the termination of the leases.

It was also pressed on behalf of the landlord that if compensation for Tenant Right was now to be awarded it would be in effect to hold that a man who was guilty of unreasonable conduct under the Act of 1881 was not guilty of unreasonable conduct under the Act of 1870.

I do not think this is the case: the Land Commission refused, the tenant not being in occupation of his entire holding, to apply

the provision of section 7 of the Act of 1896, not because he was guilty of unreasonable conduct, but because, as stated by Mr. Justice Meredith, of the comparatively small amount of the holding which was, or had been, for several years in the actual physical or apparent occupation of the lessee, the number and character of the sub-divisions, and the practical incorporation or amalgamation of portions of the holding with adjoining places of residence or business.

It was further urged on behalf of the landlord that the sub-lettings of portions of the holdings deprived the lessee of his right to compensation for Tenant Right: no authority was quoted to me in support of this contention, and, on the contrary, it seems that where a tenant of a holding, subject to the Ulster Tenant Right, lawfully sublets portion of his holding, that did not extinguish the Tenant Right in the holding at all events so far as it was attributable to the portion remaining in the tenant's occupation.

But I think, therefore, in estimating the amount of the Tenant Right in this case, regard is to be had to the fact that portions of the holding were not in the occupation of the lessee at the determination of the lease.

A further question was pressed on behalf of the landlord, namely, that the learned Recorder estimated the value of the Tenant Right on the basis, not of the existing rent of £157 8*s.* 7*d.*, which was reserved under the lease which expired, but on the basis of a rent of £123—which, upon a consideration of the schedules of the Sub-Commission, and of the reports of the Appeal Court valuers, he estimated to be the fair rent of the holding.

No case was referred to before me as showing that, before the Act of 1881, a lessee in the case of Leasehold Tenant Right on the termination of a lease was entitled to claim to remain on as tenant under the Ulster Tenant Right Custom at a rent less than the rent reserved in the lease; but under the particular facts of this case it is not necessary to decide any such general proposition.

In this case the tenant, not being in *bona fide* occupation of the holding so as to have a fair rent fixed, was not in a position to have his existing rent varied, and, therefore, I think that I am bound to estimate the value of the Ulster Tenant Right upon the

FitzGerald, J. 1905.

NICHOLSON, *Landlord*; EXECUTORS OF SMYTH, *Tenants.*

basis of the existing rent of £157 8*s.* 7*d.* This will, of course, cause a reduction in the value of the Tenant Right.

I have had the holding inspected by the assessor, and taking into consideration both the fact of portion of the holding being sublet, and also that the rent of the holding was £157 8*s.* 7*d.*, I estimate the value of the Tenant Right at £1000, and of this sum I consider Burnside should receive £240.

I think there should be no costs of the appeal.

Solicitors for the landlord: *M'Cay & Co.*

Solicitor for the tenants: *J. K. Reid.*

W. C. S.

Barton, J. 1905.

Feb. 2, 3, 8, 9. March 1.

M'MACKIN *v.* HIBERNIAN BANK.

(1903. No. 709.)

Undue influence—Mother and daughter—Attainment of age by latter—Dealing with daughter's property—Parental control—Absence of professional advice.

M. died intestate, being possessed of real estate and personalty, including leasehold lands, leaving a widow and one daughter under age. The widow took out administration, and deposited the lease of the leaseholds with the Bank as security for an overdraft and for money advanced on bills. The Bank had full knowledge of the insolvent condition of the widow's affairs and of the daughter's age and circumstances. A few days before the daughter came of age the Bank, deeming the security insufficient, applied peremptorily to the mother for payment. At an interview with the managing director, shortly after the daughter came of age, the mother offered to secure payment of the overdraft by a joint promissory note of herself and her daughter. The daughter, who was present, being asked to join, expressed her willingness by saying "Yes." Some time afterwards the Bank again pressed the mother for payment, but consented to allow a short extension of the time for payment if the mother and daughter signed a joint promissory note, payable on demand, for the entire debt. Two promissory notes for the amount were prepared by the Bank, and signed by the mother and daughter. The local manager stated in evidence that on the occasion of the signing of the notes he explained to the daughter that she would be liable for the whole amount, and that, in the event of the failure to pay the debt on the part of her mother, the Bank would look to her; and that the daughter replied that she understood all that. She had not, on this or any other occasion, independent professional advice.

The Bank recovered judgment against the daughter, and registered it as a judgment mortgage upon her lands :—

Held, that the judgment should be declared void as against the daughter.

TRIAL OF ACTION.

The following statement of facts is taken from the judgment of the learned Judge at the trial.

The plaintiff is a young lady named Miss Rose M'Mackin. The defendants are her mother, Mrs. Anne M'Mackin, and the Hibernian Bank, Limited. The action is brought to have set aside two promissory notes amounting together to £1535 ; and also to have set aside a judgment obtained by the Bank for the amount of these notes, and the registration of that judgment as a mortgage against plaintiff's lands.

The late Michael M'Mackin, J.P., of Kilcoutry House, near Fintona, county Tyrone, died intestate on September 12, 1896, leaving behind him his widow and his only child, Rose, who was then a school-girl of sixteen years of age. His daughter, Rose, upon coming of age would become entitled to his real estate, which for administration purposes was valued at a net valuation of about £3500, but was probably worth nearly £6000, and to two-thirds of his personal estate, which included the leasehold lands of Kilcoutry, and was valued for administration after deducting debts at about £650 net. The widow would be entitled to one-third of the personalty, and she also had certain claims on the realty for jointure, or dower, or both. The deceased at the time of his death owed a large overdraft to the Northern Bank, in respect of which the Northern Bank, after his death, brought a suit in the Rolls Court for the administration of his estate. In that suit, which was pending in 1901, Mr. Shields, of Omagh, acted as solicitor for Mrs. M'Mackin, and a Mr. Murphy, of Clones, acted as solicitor for Miss Rose M'Mackin.

Before her husband's death, Mrs. M'Mackin had a small personal account with the Hibernian Bank, which she continued after his death. In 1896 she made two applications to the Hibernian Bank for advances, which were declined on account of the unsatisfactory character of the security which she offered. In January, 1897, she took out administration to her husband's estate, and for a third time applied to the Bank for an advance,

Barton, J. 1905.

M'MACKIN v. HIBERNIAN BANK.

offering, as administratrix of her husband's estate, to lodge by way of equitable mortgage the lease of the Kilcoutry property as security. The Bank, having been advised by counsel that they could safely do so, granted her an advance on the security of the lease of Kilcoutry, and between that time—June, 1897—and the coming of age of her daughter in August, 1901, Mrs. M'Mackin became liable to the Hibernian Bank to the extent of £1535, of which upwards of £1000 represented an overdraft, and the balance consisted of bills or notes. When this account commenced, the Bank seemed to have ample security. In June, 1897, the local manager valued the leasehold interest in Kilcoutry at £2500. In 1898 he came down in his valuation to £1800. In 1899 his successor valued it at £1700. In 1901 the Bank came to the conclusion that it would be lucky if it received the amount of the overdraft, *i.e.* about £1000; and, as a matter of fact, it was sold afterwards in the suit in the Rolls Court for about £700. Accordingly, in 1901, just before Rose came of age, the Bank had become alive to the fact that the Kilcoutry property had been over-valued by their local manager, and that the debt of nearly £1550, due to them by Mrs. M'Mackin, was only partially secured. Under these circumstances they were interested in seeking to improve their security. Hitherto they had only looked to Mrs. M'Mackin. A letter of the inspector of the Bank, dated June 19, 1901, shows that the Bank officials had at that date begun to entertain expectations that Miss Rose M'Mackin might, on coming of age in the following August, do something in their favour for her mother. He wrote: "I hope that Miss M'Mackin will do all that is expected of her on attaining her majority, but I must say I have my doubts in the matter."

Rose was to come of age on August 23rd. On August 13th the local manager wrote to the head office stating that Mrs. M'Mackin's daughter would come of age on the 23rd instant, and suggesting that a formal demand for payment should be now made upon the mother. He added words showing that the Bank was then aware that the mother's financial position was very unsatisfactory, and that other creditors were looking for payment from the daughter. "All her creditors (and they are legion) will now press for payment, so that it would be as well for us to be first."

That information turned out to be correct. A number of her mother's creditors sought to obtain payment or security from Miss Rose M'Mackin after she came of age, and within twelve months more than a dozen bonds, mortgages, bills, or notes were obtained from her for her mother's debts, practically sweeping away all the girl's property. The Bank manager's advice to the Bank to endeavour "to be first" was acted upon. This appears by the subsequent events. A Belfast money-lender obtained from the girl a bond for £190 on September 24th for a debt of the mother's. The Hibernian Bank obtained these notes for £1550 on October 4. Mr. Shields, who was referred to in the case as the family solicitor, because he had been solicitor for the late Mr. M'Mackin, and had continued to be solicitor for Mrs. M'Mackin, obtained a mortgage from the girl for £400 in January, 1902. Other creditors obtained bills and mortgages from the girl at various dates in 1902.

Following the suggestion contained in the local Bank manager's letter of August 15th, the head office directed him to make application to Mrs. M'Mackin for payment, failing which the matter would be placed in the hands of their law agents to take legal proceedings against her. On August 17th, six days before the girl came of age, the local manager wrote to Mrs. M'Mackin applying for payment, and requesting a reply by return of post. This letter was followed by an interview between Mrs. M'Mackin and the local manager, after which he wrote on August 19th to the head office, that he had seen the lady. It was in this letter that the first suggestion appeared about the daughter signing promissory notes. He wrote:—"I would suggest taking as additional security the joint promissory note of herself and her daughter for the amount of the overdraft, when we would be safe enough. Mrs. M'Mackin intends calling to see you next week." It was admitted that the Bank manager never applied or made any communication to the girl in the matter. He relied solely upon the mother's influence over the daughter. In pursuance of this letter, about the 29th or 30th August, Mrs. M'Mackin and her daughter called at the head office in Dublin, and saw the managing director. His account of the interview was as follows: Mrs. M'Mackin said she hoped to get some advance which would enable her to reduce the Bank's debt before October. He

Barton, J. 1905.

M'MACKIN v. HIBERNIAN BANK.

pointed out that the directors were dissatisfied with the great delay, which she could not expect to continue. Ultimately, she said that she could get the account secured by her daughter, who was willing to join in a bill; and she turned to the daughter and asked her if she was willing. The daughter expressed her willingness by saying "Yes." This was the only part the daughter took in the interview. The managing director was quite candid in his evidence. The interview lasted five or six minutes. He evidently regarded it as an ordinary case of taking a security from one person in consideration of giving time to another person for the payment of that other person's debt. He admitted that he was quite aware that Miss M'Mackin had just come of age, and had been for years aware that she would come of age about this time, that he had never seen her before or since, that he asked her no question, and that it was sufficient for him that in answer to her mother's question she had expressed her willingness to join in a bill or note.

On September 3rd the managing director wrote to the local manager as follows:—"Mrs. M'Mackin called here recently with her daughter, and stated that she would pay off the overdue promissory note by 1st October next, and that her daughter was willing to join in a joint promissory note for the amount of the overdraft." In this letter the statement as to the daughter's willingness is referred to as coming from the mother alone—no importance being attached to the daughter in the matter.

The Bank held their hand for a month until October 1st. In the meantime, in September, there was a letter from the head office to the local manager to the effect that their law agents had doubts as to the complete validity of the equitable mortgage on Kilcoutry. To this the local manager replied on September 13th:—"I should advise that Mrs. M'Mackin be asked to place her securities in order, and execute a legal mortgage over the Kilcoutry property, Miss M'Mackin to join if law agents think it necessary." Here, again, there was no suggestion of consulting the young woman, or even making application to her; she was treated and regarded as a mere cypher who was expected to do whatever the law agents of the Bank might think necessary.

Before the end of September the local manager had a confidential interview with Mr. Shields. He had been the solicitor of the late Michael M'Mackin, and had continued to be the solicitor for Mrs. M'Mackin. In that sense he was the family solicitor. But as between Mrs. M'Mackin and her daughter, he was solicitor for the mother. The daughter's solicitor in the then pending suit in the Rolls Court was Mr. Murphy. The local manager received from Mr. Shields a full statement of the position of the estate; and the local manager reported the result of that interview to the head office in a letter of September 30th. Nothing was said or suggested to Mr. Shields about the pending plan to obtain promissory notes from the daughter.

Thus the Bank, before they obtained these promissory notes, knew, by a confidential interview with the mother's solicitor, every detail of the position of the estate. They knew of the hopeless insolvency of the mother, and of the fact that her liabilities would practically swallow up the whole estate, including the daughter's property if it was rendered liable to them. They had, from a reliable source, full notice and knowledge of the plaintiff's position and circumstances.

In his letter of September 30th, the local manager informed the head office that he had been confidentially informed by Mr. Shields that the whole M'Mackin estate (not including Kilcoutry, which the Bank held as security) would realize about £6000, and that Mrs. M'Mackin's liabilities, without including interest, which of course would be considerable, but including her debt to the Bank, amounted to £6000, and that there was not the slightest chance of the Bank's claim ever being paid unless they realized their security. He expressed the opinion that their security ought to be worth the overdraft, £1027, if they could find a purchaser, which would be difficult; he added that he did not think Mrs. M'Mackin would be able to pay her bills in the time she mentioned, and that he considered that, as things stood, one at all events of her liabilities to the Bank, which was a promissory note for £300, was worthless. He then made the following suggestion, which was carried out within four days:—"I would suggest the Bank's consenting to postpone taking legal proceedings until, say, the 15th prox., on the condition that

Barton, J. 1905. M'MACKIN v. HIBERNIAN BANK.

she and her daughter give their joint promissory note, payable on demand, for the entire debt, legal proceedings to be at once taken if the bills are not paid on the date named (15th prox.)." This suggestion was adopted at the head office, and authorised by a letter of October 1st; and upon October 3rd the local manager wrote to Mrs. M'Mackin as follows:—"I am instructed by my directors to inform you that they will consent to allow your bills to lie over to the 15th, provided you and your daughter at once sign a joint promissory note, payable on demand, for the amount of your debt. If you and Miss M'Mackin will kindly call to-morrow, I shall have the necessary bill-stamp ready to sign." The following day was October 4th, and upon that day, in compliance with this peremptory letter, Mrs. M'Mackin duly attended at the local office with her daughter. The local manager had the two promissory notes written out and filled up with interest calculated to date, and in the course of a few minutes the young lady made herself liable for £1,550 upon a promissory note, payable on demand, for her mother's debt, of which she did not owe a penny.

There was a conflict of testimony between the plaintiff and the Bank manager as to whether the latter gave any explanation of the notes to the plaintiff on the occasion of her signing them. The girl had no recollection of his having given any explanation. The bank manager said that he explained to her that if she signed the notes she made herself liable for the amount, and that in the event of the mother not keeping her promise to reduce the debt in the promised time, *i.e.* October 15th, the Bank would look to her and, if necessary, sue her on the bills, and he said that she replied that she understood all that. It was admitted that the girl had no independent advice. The mother's solicitor, Mr. Shields, did not hear of the transaction until the following December. The girl's solicitor, Mr. Murphy, did not hear of it for more than a year. A writ was issued against the girl by the Bank in December. In January judgment was obtained, and registered as a mortgage against her lands.

O'Shaughnessy, K.C., D. Henry, K.C., and *M'Cann,* for the plaintiffs.

Matheson, K.C., D. F. Browne, K.C., H. Wilson, K.C., and *W. G. Gibson*, for the defendants.

The following cases were cited: *Sercombe* v. *Sanders* (1); *Maitland* v. *Irving* (2); *Archer* v. *Hudson* (3); *Baker* v. *Bradley* (4); *Kempson* v. *Ashbee* (5); *Thornber* v. *Sheard* (6); *Espey* v. *Lake* (7); *Bainbrigge* v. *Browne* (8); *O'Connor* v. *Foley* (9).

March 1.

BARTON, J.:—

After stating the facts substantially as set forth above, continued as follows:—

I acquit the Bank officials of anything in the nature of conscious fraud—I observed that Mr. Henry, K.C., in his reply on behalf of the plaintiff, was careful to say of the managing director of the Bank that he is a perfectly honourable gentleman. It has not been suggested that the local Bank manager had any personal interest in the matter, or was actuated by any other motive than zeal—it would be more correct to say over-zeal—in the discharge of what he deemed to be his duty to his employers. I am willing to believe that these gentlemen were ignorant of the rules of equity which guide this Court in regard to taking securities from young persons just come of age and under parental influence. Those rules, which represent nothing more than the recognition by the Courts of certain principles of right conduct, have been frequently stated by Judges in clear and unmistakable terms, *e.g.* by Lord Langdale in *Archer* v. *Hudson* (3); by Turner, L.J., in *Wright* v. *Vanderplank* (10); by Lord Romilly in *Sercombe* v. *Saunders* (1); and by Farwell, J., in the recent case of *Powell* v. *Powell* (11). *Archer* v. *Hudson* (3) and *Sercombe* v. *Sanders* (1) were cases like the present one, of securities taken by bankers from young persons just come of age, in respect of debts of near relatives—in the former case of an uncle, in the latter case of an elder brother. These rules have not been directly applied to a banking case in

(1) 34 Beav. 382.
(2) 15 Sim. 437.
(3) 7 Beav. 551.
(4) 7 D. M. & G. 597.
(5) 10 Ch. 15.
(6) 12 Beav. 589.
(7) 10 Hare, 260.
(8) 18 Ch. D. 188.
(9) [1905] 1 I. R. 1.
(10) 8 D. M. & G. 133, 146.
(11) [1900] 1 Ch. 243.

Barton, J. 1905. M'MACKIN v. HIBERNIAN BANK.

Ireland for some years; and this case may, perhaps, serve as a useful reminder to persons, part of whose duty or business it may be to adequately secure the debts of their employers. I gather from their cross-examination that these Bank officials were under the impression that, in the case of a young person under parental influence and just come of age, a creditor, who has full knowledge and notice of the girl's age and rights and circumstances and of the parental influence, is at liberty to obtain by pressure upon the parent and by means of the parent's influence a security from that young girl for the parent's debt, and that a transaction of that kind can be supported without any proof that the young girl had independent professional advice, or was otherwise emancipated from control, so as to be in a position to exercise a free and unfettered judgment. If that was their view of their legal rights and obligations in such a matter, it is my duty to say that it was, in my opinion, a mistaken view.

It is quite true that young persons (male or female) upon coming of age obtain capacity to sign notes and to execute mortgages, and that they may render themselves liable by so doing. But it is not correct to suppose that, as soon as the clock has struck the hour of technical legal emancipation, the young person is discharged from all protection of the law. The law recognises that a young person, living with or under the influence of a parent, is likely to remain for some time under parental dominion, and is at an impressionable age, when gratitude, affection, and respect for a parent are fresh and strong, while knowledge and experience of the stress and struggle and varied obligations of human life have yet to be acquired. The law protects young persons under such circumstances and at such an age, not by curtailing their capacity to deal with others, but by binding the consciences of those who deal with them. A young person may pay or give security for a parent's or guardian's debt; and such a transaction will not be set aside if it can be shown to be a spontaneous act, carried out after real emancipation from control and influence, and with full knowledge of all material circumstances. Mr. Browne cited a case of that kind: *Thornber* v. *Sheard* (1). But such cases are rare, and the Court is jealous in

(1) 12 Beav. 589.

its investigation of cases of the kind. When the child is living with or under the control of the parent or guardian, such influence is presumed—and the burden of proof is thrown upon the person who has obtained the gift or security through the parent's influence to displace that presumption, *e.g.* by showing that the young person acted under independent professional advice. Such independent advice must be a reality, not a sham; it must be a shield for the young person, not a mere cloak to cover up the transaction.

In view of his previous letters, and of the circumstances of the occasion, I regard the explanation which the Bank manager says that he made to the plaintiff, on the occasion of the signing of the notes on October 4th, as a purely perfunctory proceeding on his part. On August 15th he had informed his principals that the girl would be of age on the 23rd, and that the "legion" of the mother's creditors would be now pressing for payment, and that it would be well for the Bank to be first. On August 19th he had suggested that the Bank should take a joint promissory note for the amount of the overdraft from the mother and daughter. On September 30th, after receiving from Mr. Shields, who was the mother's solicitor, confidential information of the practically insolvent condition of the estate, he had suggested to his superiors that time should be given to the mother, on condition of mother and daughter giving a joint promissory note for the entire debt. On the previous day, October 3rd, he had, by direction of his superiors, written a peremptory letter to the mother, offering time for ten days, provided she and her daughter "at once" signed a joint promissory note, payable on demand, for the amount of the debt, and informing her that if she and her daughter would kindly call "to-morrow," he would have the necessary bill-stamp ready. "To-morrow" had come, and he was there awaiting them, with the necessary bill-stamp ready, and the documents filled up. I do not find it necessary to place reliance on the unsatisfactory nature of the explanation itself. If it had been ever so satisfactory an explanation, the Bank manager was under the circumstances not the proper person to make it, and the appointed time and place for signing the notes was not the proper occasion for making or receiving such an explanation. It is grotesque to suggest that the Bank manager

Barton, J. 1905. M'MACKIN v. HIBERNIAN BANK.

was on that occasion seriously asking the girl to pause and consider her position before signing the notes. Besides, she practically knew nothing about her rights, while he knew everything from the most direct and reliable source. Under the circumstances any such explanation by him was merely perfunctory, with no more significance in it than if he had discoursed to the young lady about the weather.

With the full knowledge and notice which he possessed of the girl's age and position and rights, the insolvent position of the mother, and the impending attack upon the girl's small property by the "legion" of the mother's creditors, the Bank manager ought, in my opinion, to have insisted upon the girl having independent professional advice. She had a solicitor at that time acting for her in the suit in the Rolls Court, namely, Mr. Murphy, who never heard of this transaction until more than a year afterwards. Even Mr. Shields, the so-called "family" solicitor, who had a few days previously given the confidential information to the local manager which immediately precipitated the action of the Bank, was not informed and did not hear of this transaction of the signing of the notes until the following December, after a writ had been issued against the girl. He seems to have then looked after himself, and to have got a mortgage from the girl in January, 1902, for £400. That mortgage is not now in issue before me, and I am not to be understood as expressing any opinion about it one way or the other. I only refer to the incident because it illustrates the helplessness of this young woman, both before and after this transaction, so far as any advice, independent or otherwise, was concerned.

A transaction of this kind cannot stand in a Court of Equity. This was a security obtained from a young girl just come of age by a creditor through the influence of her mother and guardian for the debt of that mother and guardian, without any real consideration moving to the girl. The girl had no independent advice or protection of any kind, while the creditor had full knowledge and full notice of all the circumstances that gave rise to the equity. From first to last her personality, her point of view, her rights, were never considered by anyone. It never occurred to anybody to consult her wishes or take any serious

notice of her in relation to these dealings. All the other parties to these transactions were fully informed and were looking keenly after their own interests; but she had no information or advice, and was a mere cypher; and her fortune and property were being parted with without any real knowledge of her rights or any adequate protection of her interests. I can best conclude by quoting certain apposite words of Lord Romilly's, in *Sercombe* v. *Sanders* (1) :—"It is important that creditors should understand that they cannot improve their security, taken from persons to whom they have given credit, by inducing them at the last moment to compel near relations or persons under their influence and not in a situation to resist their importunity to pay their debts." For the reasons which I have given, there must be judgment for the plaintiff with costs.

Solicitor for the plaintiff: *Henry Murphy.*
Solicitors for the defendants: *D. and T. Fitzgerald.*

J. MAC M.

THE WATERFORD BRIDGE COMMISSIONERS *v.* CORPORATION OF WATERFORD AND THE ATTORNEY-GENERAL.

M. R.
1904.
July 15, 16, 20, 21, 30.
Appeal.
1905.
Feb. 6–9, 27.

Bridge—Navigable and tidal river—Bridge erected under Act of Parliament—Pre-existing ferry—Purchase of—Right to build new bridge without purchase of old one, or without compensation—Bridges (Ireland) Acts, 1834, 1867, *and* 1875 (4 *&* 5 *Wm.* 4, *c.* 61; 30 *&* 31 *Vict. c.* 50; 38 *&* 39 *Vict. c.* 46).

In 1786 an Act was passed by the Irish Parliament to provide for the erection of a bridge at Waterford over the river Suir, a navigable, tidal river, which divided the counties of Kilkenny and Waterford.

The Act authorised certain persons, who were to be formed into a corporation, to raise, by debentures of £50 each, a sum of £30,000; it conferred on them the power of buying up an existing ferry, and of building a bridge, for the use of which they might charge tolls, the produce of which, after repairing, lighting, and watching the bridge, and maintaining any ferry they might

(1) 34 Beav. 382.

M. R. 1904.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

establish, was to be divided among the debenture holders. The Act specified certain limits within which the bridge was to be built, and it provided that after the bridge was finished the passage over it was to be open and used as a common highway for ever. Remedies were provided for enforcing payment of the tolls, and there was a prohibition, under a penalty, of any person keeping boats to ply for hire within the defined limits.

The money was subscribed, the ferry was bought up, the bridge was built and opened for traffic in 1794. In consequence of the growth and increase in traffic, the bridge had become unsuitable for modern requirements.

In 1902 the Corporation of Waterford applied by memorial to the Lord Lieutenant, under the Bridges Act, 1834 (4 & 5 Wm. 4, c. 61), and the Acts amending the same, to enable them to erect a new bridge over the river, within the prescribed limits, without offering to purchase the rights of the plaintiffs, the corporation who owned the bridge. A commission was appointed to inquire into, and report on, the matter, and in their report they rejected the site proposed by the defendants, and recommended one close above the plaintiffs' bridge; but they expressed the opinion that a free bridge could be erected without incurring any liability to purchase the plaintiffs' rights in the bridge.

In an action brought for a declaration as to the plaintiffs' rights:—

Held (by the Master of the Rolls and the Court of Appeal), that the defendants were not entitled to erect a new bridge within the prescribed limits without purchasing the plaintiffs' rights, or otherwise compensating them.

By Letters Patent of 13th February, 1695, King William III. granted to James Roch, his heirs, and assigns, certain ferries, and, among others, the ferry of Waterford, subject as to the ferry of Waterford to the rent of £4 10*s.* Irish currency.

Down to the year 1786 this ferry afforded the only direct means of communication between the city of Waterford, at the south side of the river Suir, and the county of Kilkenny, and places beyond the same on the north side of the river.

In 1786 an Act was passed by the Irish Parliament (26 Geo. 3, c. 58) sanctioning the building of a bridge over the Suir at Waterford, by which, after reciting that the building a bridge over the said river at Waterford would tend to increase the trade of said city, and by uniting the provinces of Leinster and Munster, promote agriculture, and be of public utility; it was, among other things, enacted as follows:—

Section 1. The governor of the county of said city and certain other persons named should open a subscription for building such

a bridge, which subscription should be kept open until the sum of £30,000 should be subscribed.

Section 5. The subscribers should be united into one company for the building of said bridge, and be one body politic and corporate by the name of the Commissioners for building a bridge over the river Suir at Waterford, and have perpetual succession, and should be empowered to design and lay out in what manner said bridge should be built, and over what particular part of said river; provided that the said bridge should not be built lower down at the east end of said city than Thomas-street, and that twenty-one days' previous notice should be given in the Waterford newspaper of the day on which the site of the bridge was to be determined, and the said Commissioners should be empowered to build said bridge.

Section 6. The sum to be raised for the purpose of building the bridge should be raised by debentures.

Sections 11, 12, and 13 provided that the Commissioners should, before building the bridge, compensate the owners of the ferry, who were then to convey their interest to the Commissioners.

Section 17 enabled the Commissioners to take as tolls the sums specified in the Act, and the money so to be raised was to be vested in the Commissioners and their successors for ever, and should be applied to the purposes thereinafter directed.

Section 19 provided that the Commissioners, from the time they should purchase the said ferry, might establish, keep, and maintain the said ferry, or one or more other ferry, or ferries, with boats to ply for hire across the river, with the like powers to take and recover tolls as was given for tolls of the bridge.

Section 21 provided that the ferry or ferries should not be established higher up the river than Bilberry Rock, nor lower down than the entrance of St. Catherine's Pill.

Section 22 provided—In order to encourage persons to subscribe to said undertaking, the entire produce of the said tolls and duties, after payment of the sums which might be borrowed in pursuance of the Act, and the interest thereof, and after the expense of repairing, enlightening, and watching said bridge, and maintaining, supporting, and keeping said ferry or ferries, should be proportionably divided between the persons holding such

M. R. 1904.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

debentures, according to the value of their respective debentures, every six months for ever.

Sections 27 and 28 provided that the Commissioners might demise the tolls and mortgage the same as in the Act mentioned.

Section 34 provided that no person should keep or maintain any boats to ply for hire across the said river at any place between Bilberry Rock and St. Catherine's Pill, or to carry or convey any passenger or passengers, cattle, carriages, or goods, which was or were subject or chargeable with toll or duty by the Acts, over or across the river, except with consent of the Commissioners, subject to a penalty of £5.

Section 39 provided that, to the intent that the passage over the said bridge might always be kept open and rendered safe and commodious, and be clear of buildings as therein mentioned, after the bridge was finished and completed, as to the said Commissioners should seem meet, the passage over the same should be open, and be deemed and used as a common highway for ever.

Bilberry Rock is a large, steep cliff, extending for a distance of 500 or 600 yards on the southern bank of the said river, and above and westward of the town of Waterford. St. Catherine's Pill is at the eastern end of the town. The river is navigable to the largest ships for some distance above Waterford, and is tidal and navigable by smaller vessels up to Carrick-on-Suir, about eighteen miles higher up.

Pursuant to the provisions of the Act, and on the faith of the rights thereby conferred, divers persons subscribed the said sum of £30,000, and became united in the plaintiff Company, and the plaintiffs expended the sum in the purchase of the said ferry, and the erection of a bridge, according to the provisions of the Act.

By indenture, dated the 24th June, 1793, Cornelius Grogan (in whom the estate and interest of the said James Roch in the ferry were then vested), in consideration of £13,000 paid to him by the plaintiffs, granted unto the plaintiffs, their successors and assigns for ever, the ferry and all its perquisites.

The site of the bridge was the best and probably the only one suitable for the erection of a bridge across the said river at Waterford, which lies on both sides of the river. Nearly the entire of the business portions of the town at both sides of the river lie to

the east of it, and the waterway to the principal quays is unobstructed. It is the most westerly point at which a bridge could, with advantage, have been constructed. Opposite to Bilberry Rock, and on the northern side of said river, is a similar rock, or cliff, and these rocks, or cliffs, prevent the extension of the town up the river in a westerly direction. The bridge is a timber bridge, supported on piles of American oak, driven into the bed of the river, and crossing the same at right angles. It was 738 feet long, and about 40 feet wide, including two footpaths with a hand or cart rail. It had some 37 spans, varying from 15 to 20 feet. Near its centre the said bridge consists of a double opening portcullis or drawbridge, some 40 feet wide, through which vessels of large capacity can pass to the wharves above the bridge, the upper water of the river being thus left open for traffic of all kinds.

The bridge was opened for traffic in January, 1794, and the plaintiffs have ever since repaired, preserved, and lighted the same, and kept it open for traffic. The plaintiffs have also provided and maintained a regular service of ferry boats across the river near the eastern end of the city. The said bridge and boats afford the only means of crossing the said river at or near the said city.

The Commissioners subsequently bought up the Crown rent of £4 10*s.* Irish currency, payable to the Crown, and the same was conveyed to them by the Commissioners of Woods and Forests by indenture dated the 24th August, 1829.

The Poor-law valuation of the bridge was £3600, and the plaintiffs pay, in local taxation, nearly £1500 per annum. Since the opening of the bridge the plaintiffs have put by, out of the balance of the receipts from tolls, divers sums of money by way of reserve fund to meet the cost of unusual repairs, reconstruction, and legal or other expenses. Such a reserve was essential to the security of the plaintiffs' said property, and the compliance with the provisions of their Act as to repair and maintenance of the bridge. In the year 1901 the reserve fund, in the investments in which it then stood, was worth about £12,000.

For a considerable time past the existence of a toll-bridge at Waterford was considered detrimental to the interests of the city by the Corporation and other public bodies, and various suggestions

M. R. 1904.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

were, from time to time, made by them with a view to acquiring, by purchase, the rights of the plaintiffs, and abolishing the toll on the bridge, or erecting a new toll-free bridge; but all these proposals were based on a recognition of the rights of the plaintiffs as conferred by the Act, and on the necessity for acquiring these rights by purchase, before any new bridge could be erected.

In 1851 a bill was deposited in Parliament with the object of establishing a free bridge across the river, which recognised the rights of the plaintiffs, and the necessity of acquiring the same by purchase. The Grand Jury of the County of Kilkenny, assembled at the Spring Assizes, 1852, petitioned the House of Lords against the bill, and expressed their dissent from the bill on the grounds that the forced sale of the plaintiffs' bridge for the sum suggested in the bill was an act of confiscation, and would contravene the provisions of the Act 6 & 7 Vict. c. 42, empowering Grand Juries to agree with the owners of tolls of any bridge for the purchase thereof on the basis of an average of the sums received for the preceding three years. The bill never was passed.

In 1867 the Bridges (Ireland) Act, 30 & 31 Vict. c. 50, was passed, by section 29 of which it was provided—

> "If any such consent as is prescribed by the 26th section * of this Act shall ever be entered into between the counties of Kilkenny and Waterford, or either of them, and the county of the city of Waterford, for the purchase of the bridge and ferry at Waterford, no memorial for the effecting of such purchase shall be adopted by any Grand Jury, or forwarded by them to the Lord Lieutenant, until the same shall have been assented to by a majority in number and value of the ratepayers of the borough of Waterford, in manner provided by the Act of 17 & 18 Vict. c. 103, for the purpose of adopting the Towns Improvement (Ireland) Act."

In 1875 the Corporation of Waterford promoted a bill in Parliament for extending the boundaries of the borough of

* By section 26 it was enacted:—"And whereas, in cases where a bridge or ferry is situate wholly within the limits of a county, or county of a city, it is expedient to enable the Grand Jury of any neighbouring county, or county of a city, to co-operate with the Grand Jury of any such first-mentioned county, or county of a city, for any of the purposes of the recited Acts and of this Act: Be it therefore enacted, That it shall be lawful for the Grand Jury of such neighbouring county, or county of a city, upon and after application

Waterford for transferring to them certain powers of the Grand Jury of the city, "for authorising the purchase of the bridge over the river Suir, with a view to the removal of toll thereon," and for other purposes. This bill, which provided for the purchase of the bridge by consent, did not become law.

By the Waterford Corporation Act, 1896 (59 & 60 Vict. c. cxxv.), which extended the boundaries of the city, it was, among other things, provided by section 83, that if the bridge and ferry at Waterford should be purchased by the council of the borough of Waterford, co-operating with the Grand Juries of the counties of Kilkenny and Waterford, under the powers of the Bridges (Ireland) Act, 1867, it should be lawful for the said purchasers to continue to levy tolls in respect of the said bridge and ferry, or any bridge or ferry substituted therefor.

In May, 1902, the defendants presented a memorial to the Lord Lieutenant stating that they proposed to erect a bridge over the said river under the Bridges (Ireland) Act, 1834 (4 & 5 Wm. 4, c. 61), and the Acts amending the same; that they proposed to erect such bridge at Bilberry Rock—the site proposed being stated to be about 300 yards above the plaintiffs' bridge; that they had obtained plans for the purpose; that a resolution of their council had been passed for the erection of such bridge; that the county council of Kilkenny had consented to co-operate with them, provided that the total amount to be allowed on the county of Kilkenny during the period of redemption did not exceed £600 a year; and the defendants prayed that the powers authorised by the said Act, and the Bridges (Ireland) Acts, 1867 and 1875, should be applied for the purpose of enabling the defendants to erect the bridge at Bilberry Rock.

The memorial contained no proposal for purchase, nor was any

made and approved at Presentment Sessions for the county at large, to consent to co-operate with the Grand Jury of any such first-named county, or county of a city, for the purposes aforesaid, and to signify such consent by a resolution entered on the record of its proceedings; and thereupon all the provisions of the recited Acts and of this Act shall extend and be applicable in like manner as if the said bridge or ferry were situate between the said counties; and all acts and proceedings by the said Acts and this Act provided shall and may be done and taken accordingly."

M. R. 1904.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

such memorial assented to by a majority in number and value of the ratepayers of the borough of Waterford, as provided by section 29 of the Bridges (Ireland) Act, 1867.

By Warrant, dated the 23rd October, 1902, the Lord Lieutenant appointed D. B. Sullivan, K.C., Bindon B. Stoney, A. M. Burden, and W. E. L. Duffin, to inquire into and report upon the circumstances stated in the memorial, and report on the propriety and expediency of having said new bridge erected pursuant to the provisions of the statutes.

An enquiry was opened at Waterford on the 28th October, 1902, by the Commissioners; but in consequence of informalities, this enquiry was not proceeded with.

A new memorial was presented to the Lord Lieutenant in 1903, and a second enquiry was opened at Waterford before the same Commissioners on the 31st March, 1903, and was continued on several subsequent days. Shortly afterwards the Commissioners made their report, by which they stated the result of their enquiry to be—That a bridge as high up the river as Bilberry Rock would be of little service to the city or counties; that the site was totally unsuitable; that, moreover, a public bridge with a rising gradient so as to be low-level at one end and high-level at the other must necessarily be inconvenient; that the site selected by the said defendants for the proposed bridge was not beyond the limits mentioned in the plaintiffs' said Act; that the Commissioners rejected the proposal to build the new bridge at Bilberry Rock; that a new bridge, if built at all, must be constructed between the eastern end of Bilberry Rock and the plaintiffs' bridge, in other words, within the admitted limits of the plaintiffs; that the plaintiffs enjoy no such monopoly as they claimed; and that the construction of a free bridge across the said river at the point recommended in the report would be no disturbance of the rights which the plaintiffs really possessed; that believing that the whole river frontage of the city was open to them for the selection of a site (restricted only by the duty of avoiding obstruction to the traffic and working of the plaintiffs' bridge), they decided to recommend a point marked on the map accompanying their report, above and almost immediately beside the plaintiffs' bridge, and so close thereto that, as stated in the report, "a vessel passing through the

opening of one bridge will immediately pass through that of the other, much in the same way as if it had to pass through a single, wide bridge." They finally urged that the erection of a new toll-free bridge at Waterford was a matter of urgent local necessity, and of more than provincial importance, and that a new free bridge should be erected.

On the 11th July, 1903, a communication with respect to the said report was, by direction of the Lord Lieutenant, made to the defendants to the following effect:—The Commission, while strongly recommending that the provisions of the Bridges (Ireland) Acts should be put into operation, and that a new free bridge of suitable dimensions and character should be erected, had rejected the proposal of the said defendants to build a new bridge at Bilberry Rock. His Excellency was advised that the only course open to him was to treat the report as, in fact, disapproving the particular scheme submitted; and he rejected the prayer of the memorial.

The defendants presented a further memorial to the Lord Lieutenant praying that the powers authorised by the Bridges (Ireland) Act, 1834, and the Acts amending the same, and all other powers authorised by the Bridges (Ireland) Act, 1875, be applied for the purpose of enabling them to erect a bridge over the river at Waterford, and wholly within the borough of Waterford. This memorial contained no proposal to purchase the plaintiffs' bridge or ferries; it did not allege any consent to such purchase or taking as required by the Act of 1867, nor did it specify any site for the proposed new bridge.

The plaintiffs claimed—(1) A declaration that the erection and maintenance of a bridge for public traffic across the river Suir at Waterford, at any place not higher up the said river than Bilberry Rock, or lower down than the entrance of St. Catherine's Pill, would be a disturbance and interference of and with the rights of the plaintiffs under the Act of 26 Geo. 3, c. 58; and a disturbance and interference of and with the plaintiffs' ferries across the said river, and would be a nuisance to the plaintiffs. (2) A declaration that the erection and maintenance of a bridge for public traffic across the said river within such a distance from the plaintiffs' bridge, erected under the said Act,

M. R. 1904.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

and the plaintiffs' ferries, as to materially divert the traffic therefrom, respectively, would be a disturbance of, and interference with, the plaintiffs' said rights and ferries, and would be a nuisance to the plaintiffs. (3) An injunction to restrain the defendants, the Corporation of Waterford, from erecting or maintaining any such bridge. (4) An injunction to restrain the defendants from taking or continuing any proceedings to promote or procure the erection or maintenance of any such bridge. (5) An injunction to restrain the defendants from taking or continuing any proceedings for the purpose of obtaining powers for the erection or maintenance of such a bridge, without complying with the provisions of the Bridges (Ireland) Act, 1867.

The Corporation of Waterford, by their defence, claimed the right to erect a bridge at any point of the river Suir, whether within or without the limits mentioned in the plaintiffs' Act, and that such a bridge would be no infringement of any rights of the plaintiffs, under 26 Geo. 3, c. 58, and that consequently there was no obligation to purchase the plaintiffs' rights.

The defendants further pleaded that provided they complied with the requirements of the Bridges Act, 1834, and the Acts amending it, and obtained a warrant from the Lord Lieutenant under the said Acts, they would be entitled to erect a bridge between the eastern end of Bilberry Rock and the plaintiffs' bridge without violating any rights of the plaintiffs, as the plaintiffs were not in the position of the ferrymen, whose property they acquired, as the privileges of the ferry merged in the rights obtained by the plaintiffs under 26 Geo. 3, c. 58; and that the only rights that the plaintiffs possessed were those conferred on them by the said Act of Parliament.

A defence was filed on behalf of the Attorney-General, in which it was stated—The Attorney-General will submit to the Court on the trial of this action that the plaintiffs' rights are defined by, and limited to, the protection given to them by 26 Geo. 3, c. 58 (Irish); and the Attorney-General will further contend that the proposed free bridge would not, if erected, violate any of the rights conferred on the plaintiffs by the said Act, or contravene any of the provisions for the protection of the plaintiffs contained therein, or in any of the other statutes in

the statement of claim mentioned, and that this action is therefore not maintainable.

M. R. 1904.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

O'Connor, K.C., *Cherry*, K.C., and *M'Carthy Mahony*, for the plaintiffs.

Gordon, K.C., *Matheson*, K.C., and *W. G. Jefferson*, for the Corporation of Waterford.

The Solicitor-General, *Jellett*, K.C., and *Cecil Atkinson*, for the Attorney-General.

July 30.

THE MASTER OF THE ROLLS (after stating the facts as set out in the pleadings) :—

The preamble of the Act 26 Geo. 3, c. 58 (1786), on which so much turns, recites—"Whereas the building a bridge over the river Suir at Waterford will tend to increase the trade of said city, and by uniting the provinces of Leinster and Munster promote agriculture and be of public utility: be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that immediately after this present Act shall pass into a law, the Governor or Governors of the County of the City of Waterford, the Right Reverend the Bishop of Waterford and Lismore, the representatives of the County of Waterford, the representatives of the County of the City of Waterford, the Dean of the Cathedral Church of Waterford, the Mayor, Recorder, and Sheriffs of the said city of Waterford, all for the time being, and their successors, shall open a subscription for building a bridge over the river Suir at Waterford, which said subscription shall be kept open until the sum of thirty thousand pounds be subscribed for the purposes aforesaid, and for the other purposes hereinafter mentioned." Under section 5, when one-fifth of the subscription is paid, the subscribers are to be incorporated into a Company with perpetual succession and a common seal by the name of the Commissioners for building a bridge over the river Suir at Waterford. The 11th section is important, and it provides—"That as soon as the said Commissioners shall have appointed and assigned how and in what

M. R. 1904.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD

manner the said bridge shall be built, the said Commissioners, or their successors, before they shall proceed to build said bridge, shall summon the owner or owners, and all persons whatsoever having or claiming any estate or interest in and to the ferry plying for hire over said river Suir, from the quay at Waterford to the opposite side of said river, to meet said Commissioners, or their successors, or any twenty-one or more of them, at such time and place in said city as shall be mentioned in such summons, in order to agree with such owner or owners, or other person or persons, either for the purchase of their respective estate and interest in said ferry, or to make them recompense for any damage or loss that may be sustained by them respectively by the building of such bridge, at the election of such Commissioners, which summons shall be served upon, or left at the dwelling-house of, such person or persons respectively, fourteen days at least before they shall be required to meet said Commissioners." Section 17 is that which gives the Commissioners power to charge toll, and it provides—"That it shall be lawful to and for the said Commissioners, and the successors of them, or any twenty-one or more of them, and they are hereby authorised and empowered to take and receive, or cause to be taken and received, in the nature of a toll, before any passage over the said bridge shall be permitted, any sum which the said Commissioners, &c., . . . at any meeting or meetings shall direct, not exceeding the following rates, &c., . . . which said respective sum and sums of money shall be demanded and taken in the name of or as a portage, toll, or duty, and the money so to be raised as aforesaid is and shall be hereby vested in the said Commissioners, and the successors of them, for ever." Section 19 provides that the Commissioners and their successors may continue the ferry, or establish and maintain one or more other ferry or ferries in Waterford, with power to levy toll with like remedies for recovery of the tolls and duties of the bridge, that is (section 20), they "shall not take or exact more tolls or duties for the carriage of passengers, &c., over or across the said river than are hereinbefore particularly set forth and required to be taken for the passage of said bridge." And section 21, "provided also that the said ferry or ferries shall not be established higher up said river than Bilberry Rock, nor lower down than

the entrance of St. Catherine's Pill." Section 27 gives the Commissioners power to let the tolls for three years; and section 28 gives the Commissioners power to mortgage the tolls for thirty-one years. Then section 34 is one which imposes penalties on persons other than the Commissioners keeping ferry boats for hire between Bilberry Rock and St. Catherine's Pill, that is, it enacts "that no person or persons shall keep or maintain any boat or boats to ply for hire over or across said river, at any place between Bilberry Rock and St. Catherine's Pill"; and it then goes on to impose a penalty on "any person or persons" who "shall keep or maintain any boat or boats for any of said purposes, or shall convey any passenger or passengers, cattle, carriages or goods, over or across said river within the before-mentioned places, not licensed or appointed as aforesaid." Section 39 provides that the passage over the bridge is to be always kept open, and rendered safe and commodious, and "be deemed and used as a common highway for ever."

It is, I think, the true view that the earlier section (21), which is somewhat analogous in its wording, is to be construed with section 34, which imposes a penalty, and which is in terms free from doubt. "Higher up than Bilberry Rock," no doubt, *prima facie*, would mean higher up than the highest part of that rock; but might be capable of meaning higher up than any part of Bilberry Rock. When the same statute imposes penalties for erecting ferries, &c., between Bilberry Rock and St. Catherine's Pill, there is no ambiguity; and I think both sections were very plainly intended as descriptive of the same place. The statute thus defines the sphere and scope of the ferry; and, I think, by inference, of the bridge also. No reason can be suggested for putting a different construction on the two sections, if they can possibly stand together; and the one which directly deals with competition is the 34th.

The intention to build a bridge is not disputed. The statute which was to afford facilities for the erection of bridges in Ireland is the Act of 1867 (30 & 31 Vict. c. 50), and the proceedings were taken under it. *Leamy* v. *Waterford & Limerick Railway Co.* (1) arose on a bill of exceptions. The jury had found that the carriage of passengers by a Railway Company over the river Suir to

(1) 7 Ir. C. L. R. 27.

M. R. 1904. WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

their terminus within the ferry limits was an interference with plaintiff's right of ferry and tolls, and the Court overruled the exceptions which required a direction for the defendants. These matters were conducted with great strictness in those days; but it is impossible to read the pleadings without seeing that the rights of ferry and tolls were somewhat mixed up, and it is rather difficult to get any distinct principle from the decision, but it certainly proceeded on the recognition of the plaintiff's rights to sustain an action for disturbance of his ferry and bridge tolls, and to that extent it is of importance.

The proceedings for obtaining authority to construct a new bridge under the Bridges Act have been regularly taken; but it could not be contended that they confer any title to interfere with the plaintiffs, if such interference was otherwise illegal.

What, then, are the plaintiffs' rights?

They are (1) in respect of the ferry, and (2) in respect of the bridge; and they should be treated separately.

1. The question of the ferry has to be considered as if the Bridges Act had not passed at all, and as if the ferry still continued to exist, although the ferry rights had merged in those of the bridge. The ferry was supposed to have been included in the Charter of Incorporation of Waterford by King John. At any rate, it was an ancient ferry, and recognised as such in the Patent of William III., in 1675. It so remained till the Act of 1786, a period of more than a hundred years.

What is the effect of this Act upon the ferry?

It did not in terms put an end to it. On the contrary. But after the bridge was built the ferry could not be maintained in the same place.

The Bridge Commissioners might either purchase, or compensate; and they purchased from Grogan, the representative of Roch.

Probably the practical effect of this was that the ferry would remain till the bridge was completed (which would take some years), while afterwards it would be available in time of need, when the bridge was closed by accident or the like (on this question see *Londonderry Bridge Commissioners* v. *McKeever* (1) in the Court of Appeal, and the observations of FitzGibbon, L.J.).

(1) 27 L. R. Ir. 464.

Other ferries under the Act could be set up in different places. But whether the ancient ferry was legally merged (so to speak) in the bridge, or whether it is theoretically existent (as seems assumed in *Leamy's Case* (1)), it has fallen utterly into desuetude; and if plaintiffs' rights depended upon it, apart from the bridge, *e.g.* if the titles to them were in different hands, it would be vain to ask for interference by the Court for its protection. It would be hopeless to ask for an injunction to restrain interference with a ferry which had ceased to exist in fact for more than a hundred years, and which so long as the bridge lasts can never be used again. Another ground which was much pressed was in reference to the cases referred to on the hearing before the Commissioners, and which are referred to by them in their report (*Hopkins* v. *The Great Northern Railway Co.* (2) being stated in the report as having altered the law as it formerly existed under the decision of *Reg.* v. *Cambrian Railway Co.* (3)). That, I think, is an oversight on the part of the Commissioners. *Reg.* v. *Cambrian Railway Co.* (3) proceeded on a dictum of Lord Blackburn, as to what would constitute an interference with a right of ferry; but in *Hopkins* v. *The Great Northern Railway Co.* (2), where the judgment of the Court was considered, and all the Judges came to the conclusion that the point as to whether the exclusive right of the ferry extends beyond the carriage of passengers by boat was not necessary to be decided, but they did decide that the injury being occasioned, not by construction, but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railways Clauses Act. On this last point only the one case overrules the other. Both cases arose under the Lands Clauses Act, and the question in *Hopkins' Case* (2) was whether a railway bridge and foot-bridge, the foot-bridge being used by persons going to the railway station, and also to other places, was an interference with a right of ferry across a river. Mellish, L. J., says:—"We will first consider that which is by far the most important, whether an action could have been maintained in respect of the diversion of traffic caused by the railway bridge. Now in order that such an action may be

(1) 7 Ir. C. L. R. 27. (2) 2 Q. B. D. 224. (3) L. R. 6 Q. B. 422.

M. R. 1904.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

maintained, it is clearly not sufficient for the owner of the ferry to prove that something has been done by which traffic has been diverted from his ferry. He must prove that his right has been violated. He is the owner of a particular description of monopoly, which the law allows to be created from its being presumed to be for the public advantage; and to maintain an action he must prove that the defendants have in substance done that which he has the sole right to do. Now we apprehend that the owner of a ferry has not a grant of an exclusive right of carrying passengers and goods across the stream by any means whatever, but only a grant of an exclusive right to carry them across by means of a ferry. In *Payne* v. *Patridge* (1) it was laid down that the owner of a ferry could not himself build a bridge in substitution for the ferry" (that does not apply to the present case, where there is an Act of Parliament), "which seems a clear decision that he has not a grant of every mode of carrying goods and passengers across; for if he had he would surely be entitled, if not bound, to provide the best means of crossing. The first grantee of the ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in the particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. There is nothing in the nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances and future discoveries of an entirely different description of transit by which ferrying might be superseded. The Crown professes to protect the grantee against the competition of other persons who are in the same line of business, and do the same thing that he does; but he appears to run the risk of any change of circumstances, which may render ferrying at that place useless. There is no doubt, however, that the right of the owner of a ferry does extend somewhat beyond a mere right to bring an action against persons who have carried goods or passengers for hire by boat from one

(1) 1 Salk. 12.

terminus of his ferry to the other"; and he proceeds to examine the authorities for the purpose of seeing what the limit of the right of the owner of the ferry is. The result of *Hopkins' Case* (1) seems to be that the owner of a ferry cannot complain of an injury to his property caused by means other than ferrying.

The plaintiffs' case then turns upon the bridge.

That the erection of another bridge toll-free in immediate proximity with the plaintiffs' toll-bridge will interfere with it is self-evident. It is not disputed that it would in effect destroy it: as no one will pay to go over a bridge if he has another one, and likely a better one, close by, toll-free. If the question in this case between bridge and bridge were the same as between ferry and ferry, there would not be much to debate.

Again, it is not disputed that the plaintiffs' old bridge is inadequate satisfactorily to meet all the requirements of the existing and developing traffic of Waterford. Both parties are practically agreed that the time has come when a better means of communication is required; and I am entirely of the same opinion from what I have seen of the case. There is some evidence particularly that heavy weights cannot pass over the plaintiffs' bridge with safety; at any rate, there is a conflict of evidence on the point. There is evidence that very heavy machinery has had to go round a considerable way in order to be transported from one side of the river to the other. The bridge is a very old structure, and it is desirable that there should be a new one. At the same time, I am not sure that some of the evidence as to the capabilities of the bridge was not exaggerated. It appears that heavy machinery was carried across the river by steamers. However, the common case is that the bridge is inadequate to modern needs. The tolls themselves, which are considerable, tend to depress the business of the town, and to impose a considerable tax on the traders and merchants. That cannot be doubted. But traders will have to pay in some form if another bridge has to be constructed. They will have to pay the cost of it, or the interest will fall on somebody. The tolls are adequate

(1) 2 Q. B. D. 224.

M. R. 1904. WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

to keep up the existing bridge, and to provide a reserve fund; the exact amount of it I am not able to state, but at one time it was £12,000; and they were also adequate to pay a dividend to the subscribers after providing for the repair, watching, and lighting of the bridge. It has been stated that a dividend of 12 per cent. has been paid for a considerable number of years.

A new bridge, however, is eminently desirable, on grounds of public policy and the legitimate interests of great railway companies and other industries.

But can this be done without compensating the plaintiffs? The greater the public need and the greater the area of interest that would be affected or promoted by the establishment of a new bridge, the easier is it to compensate the owners of the existing bridge.

This is the real question, because some new bridge or means of crossing the Suir is manifestly needed, and if an Act of Parliament should be necessary for the purpose, I may say that it is a case in which the Legislature probably would, or ought, to interfere.

This question again depends upon another, viz.: Are the plaintiffs bound to maintain and repair the present bridge (as they would be bound to keep up a ferry if there were no bridge) in perpetuity? For if they are, and can only do so out of tolls, any act which will interfere with their power to collect tolls is an interference with their rights. This was the common test suggested by both plaintiffs and defendants. Indeed, as the plaintiffs have no fund but tolls, or money derived from tolls, their duty to maintain the bridge without limit of time implies their perpetual right to receive the tolls.

This depends on the statute and that alone, for the bridge is a statutory one altogether. It appears to me that more light on this question is to be derived from a consideration of the general scope and object of the Act, than from an analysis of different sections. Is it possible to read the Act without coming to the conclusion that it is meant to establish a bridge to exist for ever, or as near thereto as the subject-matter will admit?

The subscribers are constituted a body corporate with perpetual

succession. The tolls are to be vested in them "for ever" (sect. 17).

The purpose of the Act is a public purpose, and the bridge, when completed, was a public highway, subject to the right to toll (sect. 39).

Although a public highway, there is no other body than the plaintiffs who could be held liable for its repair. Certainly not the Corporation of Waterford, nor the Grand Jury of Waterford, nor the Grand Jury of Kilkenny. If plaintiffs are not bound to maintain it for ever, it must fall to ruin if they find it their interest to abandon it.

There is no mode of which I am aware in which the Commissioners can divest themselves of the property vested in them by the Act.

Contrast the case of *Nicholl* v. *Allen* (1). In *Nicholl* v. *Allen* (1) the bridge in question had been built by a private individual, with power to take tolls under Acts of Parliament, and it was held by the King's Bench and by the Exchequer Chamber that the statutes in question imposed upon the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received tolls. Crompton, J., went so far as to say that the private owner could only get rid of the obligation to repair under the Act in one or other of two ways, either by assigning to a pauper, or if the bridge were totally destroyed. A private individual might assign to a beggar, and so possibly relieve himself from the obligation to repair; but in this case it is obvious that no such course could be taken. Here there was a Corporation established for one special purpose, and they had no power to assign. They have power to lease the tolls for three years, and they have a very important power to mortgage for thirty-one years. But if they created a mortgage for thirty-one years, are they under the obligation to maintain the bridge during the time it exists? Obviously they would be, even if there were no tolls applicable to the purpose. In *Nicholl* v. *Allen* (1) private individuals, who had sustained damage by reason of the bridge not having been kept in repair, brought an action, and it was held that although the bridge had

(1) 1 B. & S. 916, 934.

M. R. 1904. WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

been erected under merely permissive powers which need not have been acted on, yet that the defendants having taken the bridge accepted the obligation that the statute in the case contemplated.

Erle, C.J., says:—"We all agree with the Court below that an action lies in this case. These statutes, 20 Geo. 2, c. 22, and 20 Geo. 3, c. 32, are merely permissive, and consequently, if the party chose, he might have held his hand and declined to act under them or take the benefit they offer him. But having taken the benefit under them, it appears to me he took the burden with the benefit, for the statutes contemplated that both were to go together. I think that the case in the House of Lords of *The Mayor and Burgesses of Lyme Regis* v. *Henley* (1) is a strong authority in point. There a Charter of the King granted to the Corporation of a borough the borough in fee, remitting to them also part of an ancient fee farm rent, and saying that the Corporation should repair the buildings, banks, shores, and all other mounds and ditches within the borough; and it was held, after much litigation, that that Charter, as it conferred a benefit, imposed an obligation to repair the buildings, &c., so that an action lay against the Corporation by an individual whose house had been injured by the sea, in consequence of the neglect of the Corporation to repair the sea-shore and mounds. And the Court relied on *Brett* v. *Cumberland* (2), where Queen Elizabeth by Letters Patent granted to a party a water-mill for life, and those Letters Patent expressed the will of the Crown to be that the lessee and his assigns should sufficiently repair the said mill, &c., and leave them sufficiently repaired. The lessee, having taken the premises under the grant from the Crown, took with them the obligation to keep them in repair, and an action lay against him for not doing it. So, here, the defendant took under these statutes the benefit of the tolls of this bridge, and consequently took also the burden of keeping it in repair. Now, the bridge having fallen down, and power being also given him to take tolls at the ferry while the bridge is out of repair, I am clear that during that time he has an obligation on him to take steps for repairing the bridge, so that a party suffering special damage from his neglect in that

(1) 1 Bing. N. C. 222; 2 Cl. & Fin. 331. (2) Cro. Jac. 521.

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M. R. 1904.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

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M. R. 1904. WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

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(1) 1 Bing. N. C. 222; 2 Cl. & Fin. 331. (2) Cro. Jac. 521.

respect, as it appears in this case the plaintiff has done, may maintain an action against him."

There was another question in the case more noticed in the Exchequer Chamber than in the King's Bench, which was as to whether a mandamus might issue directing the defendant to reinstate the bridge. There was a consent that a mandamus might issue against him if the defendant was liable to an action; but the Court held that they could not consent to the issuing of a mandamus for disobedience to which the defendant would be liable to be attached, and perhaps imprisoned for an indefinite time.

The argument of the defendants on this part of the case is a peculiar one. They say, "What we propose to do will deprive you of tolls, and leave you without funds to discharge your duty under the Act; but when the funds cease, the duty ceases too, because it would be an answer to any proceeding to say there is no fund to repair."

Even if this were so in the case of a third person, it does not follow that it is not an actionable wrong to deprive the plaintiffs of their tolls, and then set up that which is complained of as an answer to the complaint.

But I am aware of no authority for the proposition in a case analogous to the present. While the bridge lasts, the Commissioners must maintain it, unless such cases as *Grant* v. *Sligo Harbour Commissioners* (1), to which Mr. Matheson referred me yesterday, apply. *Grant's Case* (1) is, however, essentially different. It is not the case of a highway, which somebody must repair, but of a harbour. It is not the case of tolls, but of a rate.

The distinction between the case before the Court and those of highways was expressly taken by May, C. J. He says, pp. 196, 197:—"The first case (that is *Hartnell* v. *The Ryde Commissioners*) (2) was decided upon the ground that by statutory enactments the Commissioners were rendered guilty of a misdemeanour if they refused or neglected to repair any highway within the limits of their special Act, and indictable as the parish would have been before the passing of that Act. Under such circumstances, it was held unnecessary to aver the possession by the

(1) I. R. 11 C. L. 190. (2) 4 B. & S. 361.

M. R. 1904.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

Commissioners of funds applicable to the repair of such highway, inasmuch as if a parish be indicted for non-repair of a highway within it, the want of funds constitutes no defence. The case of *Ohrby* v. *Ryde Commissioners* (1) proceeded upon the authority of the former case. The case of *The Mersey Docks* v. *Gibbs* (2) proceeded upon the principle that if an artificial work, such as a dock, be under the control of persons who invite the public to make use of it, charging tolls for such use, they are liable in damages if injury be caused by reason of their neglect to keep such work in proper repair, and that no defence is afforded by the fact that the persons in whom such work is vested are responsible trustees, and do not receive the surplus tolls for their own benefit." He then refers to some other cases, and decides that the defendants could not be held liable for neglect of duty in reference to Sligo Harbour, as they had no funds available for cleansing, deepening, and removing the obstructions therefrom.

The real fact is that the framers of the Act of 1786 had no idea that the trade of Waterford would increase as it has done, and so assumed that the bridge properly repaired from time to time would suffice for all time. The Argo might have remained in the Acropolis till this day if the repairing process had been kept up. Whether repairing would involve replacing the bridge when and if worn out, or swept away by sudden flood, is a question which does not now arise. As long as the Commissioners have the bridge, they, and they alone, are responsible for its repairs, and must apply their tolls to that purpose; and they cannot get rid of the bridge, nor of their liability, unless the bridge is bought up under the authority of the statute. See *Newton* v. *Cubitt* (3) and *Letton* v. *Goodden* (4).

In arriving at this conclusion, I do not feel bound to refer to all the numerous cases (chiefly in reference to ferries) cited during the argument, partly because I had to consider them in the case of *Londonderry Bridge Commissioners* v. *McKeever* (5), and partly because they do not much affect the present question, which in my view of it turns upon a particular statute.

(1) 5 B. & S. 743.
(2) L. R. 1 H. L. 93.
(3) 12 C. B. (N. S.) 32.
(4) L. R. 2 Eq. 123.
(5) 27 L. R. Ir. 464.

I am, on the whole, satisfied to find myself obliged to decide in favour of the plaintiffs, because a different decision would be contrary to justice, and also because the view I take is in accordance with that entertained without interruption from the earliest time to which the investigations of the parties reach back (until the other day)—a view recognised by the Legislature, and in *Leamy's Case* (1) accepted, at least, by the high authority of Lefroy, C.J., and the Court of Queen's Bench.

The plaintiffs ask first for a declaration that the erection and maintenance of a bridge for public traffic across the river Suir at Waterford, at any place not higher up the said river than Bilberry Rock, or lower down than the entrance of St. Catherine's Pill, would be a disturbance and interference of and with the rights of the plaintiffs under the said Act, 26 Geo. 3, c. 58, and a disturbance and interference of and with the plaintiffs' ferries across the said river, and be a nuisance to the plaintiffs. The terms of this declaration involve the question of the construction of the Act of Parliament. To that declaration the plaintiffs are entitled.

R. W. L.

(1) 7 Ir. C. L. R. 27.

Appeal. 1905.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

Feb. 6–9, 27.

The Corporation of Waterford appealed (1).

Gordon, K.C., *Matheson, K.C.*, and *W. G. Jefferson*, for the appellants:—

We submit that the defendants are entitled to erect a bridge over the Suir without any obligation to purchase the plaintiffs' bridge or ferry. The Act of 1867, under which the bridge was built, put an end to the ferry which then existed; and the right of ferry became merged in, and extinguished by, the statutory rights then given: *New Windsor Corporation* v. *Taylor* (2). The Act did not give the Commissioners a monopoly. It authorised them to build a bridge, and to receive tolls, provided they kept the bridge in repair, and everything received after that they might appropriate to themselves. The duty of maintaining and repairing the bridge only exists as long as the owners receive tolls: *Nicholl* v. *Allen* (3); consequently, if the new bridge takes away the traffic from the old one, the duty of maintaining the latter will cease. The traffic which now exists in this locality is different from that which existed in 1786, and the present bridge is wholly insufficient for modern requirements. The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway, by bridge or ferry, made to provide for a new traffic: *Hopkins* v. *Great Northern Railway Co.* (4).

The Bridge Acts, beginning with 4 & 5 Wm. 4, c. 61, form a code by themselves, and are not to be taken as a supplement to the Grand Jury Acts, or to be read along with them. The Act of 1834 provided that Grand Juries might apply by memorial to the Lord Lieutenant for powers to build, rebuild, or repair bridges between two counties, and on his being satisfied by a report as to the necessity of the work, he might order the bridge to be built, or rebuilt. But there was no power prior to 1867 to make a Grand Jury of a neighbouring county or city co-operate in the expense, where a bridge was wholly in one county or one city. The Act of 1867 gave that power by section 26. The Lord Lieutenant has power, under 4 & 5 Wm. 4, c. 61, to exercise his discretion, and

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ.

(2) [1899] A. C. 41.

(3) 1 B. & S. 916, 934.

(4) 2 Q. B. D. 224.

give the defendants leave to build a bridge. The injunction sought for here would appear to seek to restrain the Lord Lieutenant from exercising his discretion, and also to restrain the defendants from exercising a common law right—that of asking Parliament for additional powers.

Ronan, K.C., O'Connor, K.C., Cherry, K.C., and *M'Carthy Mahony*, for the respondents:—

The Corporation of Waterford cannot build a bridge within the limits defined by our Act without purchasing our rights, or otherwise compensating us. Several Acts were passed by the Irish Parliament to provide for the erection of bridges. The Act 5 Geo. 3, c. 14 (Ir.), authorised the owner of a ferry to erect a bridge in place of a ferry, and charge tolls. By the Grand Jury Act, 13 & 14 Geo. 3, c. 32 (Ir.), Grand Juries were empowered to build bridges themselves. Sect. 15 authorised the building of a bridge over a river wholly in one county; and sect. 17, the building of a bridge over a river that was the boundary between two counties. By 19 & 20 Geo. 3, c. 41 (Ir.), Grand Juries could receive proposals from private persons to build bridges without expense to the county, and charge tolls; and power was conferred on Grand Juries to raise money, and make bridges toll-free. By the Grand Jury Act, 36 Geo. 3, c. 55 (Ir.), Grand Juries were empowered to purchase the property in bridges, and open them free of toll.

There were also some bridges built under special statutes in a similar way as the plaintiffs' bridge, *e.g.* the bridge over the Shannon at Portumna, under 35 Geo. 3, c. 17 (Ir.), and the bridge over the Barrow at New Ross, under 35 Geo. 3, c. 48 (Ir.).

The power conferred on Grand Juries was extended by the Bridges Acts, which must be read along with the Grand Jury Acts, so far as this part of the work and powers of the Grand Juries was concerned. By 4 & 5 Wm. 4, c. 61, power was given to build a bridge over a river between two counties, and to get the neighbouring counties to contribute to the expense. By 30 & 31 Vict. c. 50, Grand Juries were enabled to purchase bridges; before that Act, there was no power to buy up an existing bridge, or tolls, or a ferry. If the Corporation of Waterford have the right contended for, *i.e.* to build a new bridge without compensa-

Appeal. 1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

tion, and without purchase, it would not have been necessary to pass this Act at all. Moreover, by sect. 29 of this Act, it was provided that if a consent to purchase the plaintiffs' bridge should be entered into, no memorial for effecting such purchase should be adopted by any Grand Jury until the assent of a majority of the ratepayers of Waterford should be obtained. Then the Waterford Corporation Act of 1896 (59 & 60 Vict. c. cxxv.) provided, by sect. 83, that if the bridge and ferry should be purchased by the Corporation of Waterford, with the co-operation of the Grand Juries of Kilkenny and Waterford, under the power of the Bridges Act, 1867, it should be lawful for the purchasers to continue to levy tolls as therein mentioned.

Taking these statutes as a whole, the basis on which they are framed is that purchase or compensation is the method to be adopted for acquiring an existing bridge, and they do not entitle any person, or corporation, to interfere with private rights without compensation. An intention to take away property without compensation should not be imputed to the Legislature, unless it is expressed in unequivocal terms: *Commissioners of Cape Colony* v. *Logan* (1). If the contention of the defendants is right, the power given to the Lord Lieutenant would override the private rights of individuals without notice being given to them. The right to the ferry still exists, and building a railway-bridge over a river within the limits of a ferry is a disturbance of the right of ferry: *Leamy* v. *Waterford and Limerick Railway Co.* (2). If a grant of a ferry is made by the Crown, the right of lessees under such grant is not limited to a point to point ferry, but extends to any part of the river within the specified limits, and such lessees may change the localities of transit to any point within such limits: *Hemphill* v. *M'Kenna* (3). The owner of a ferry, being a franchise, is entitled to compensation under the Lands Clauses Consolidation Act for a disturbance of his ferry: *Reg.* v. *Cambrian Railway Co.* (4). This case was not overruled on this point by *Hopkins* v. *Great Northern Railway Co.* (5). A bridge is always a disturbance of a ferry, or a ferry of a bridge.

(1) [1903] A. C. 355.
(2) 7 Ir. C. L. R. 27.
(3) 8 Ir. L. R. 43.
(4) L. R. 6 Q. B. 422.
(5) 2 Q. B. D. 224.

The Solicitor-General, Jellett, K.C., and *Cecil Atkinson*, for the Crown.

Appeal. 1905.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

The Solicitor-General stated that he would not oppose a declaration being made in favour of the plaintiffs in the terms prescribed by sect. 21 and sect. 34 of the Act of 1786, sect. 21 being the section which provided that "the said ferry or ferries should not be established higher up the said river than Bilberry Rock, nor lower down than the entrance of St. Catherine's Pill"; and sect. 34 being the section which provided that "no person or persons should keep or maintain any boat or boats to ply for hire over or across said river, at any place between Bilberry Rock and St. Catherine's Pill, as aforesaid," or to carry passengers, cattle, or goods chargeable with toll, over or across the river, except such persons as should be licensed.

Ronan, K.C., stated that, on behalf of the plaintiffs, he would be content with such a declaration.

FITZ GIBBON, L. J.:— Feb. 27.

The parties to this litigation are two public bodies, each constituted by statute, except so far as the Waterford Corporation is the survivor of the old municipal body, and their powers and rights in respect of all the matters in dispute, as well as all other powers and privileges which they possess, must be capable of being referred to some specific origin, to be found in an existing statute. The statutes require detailed examination, which it would be idle to repeat, and my colleagues will state the judgment of the Court upon that subject. I confine myself to a general statement of our opinion upon the case.

By the Waterford Bridge Act, 26 Geo. 3, c. 58, the plaintiffs obtained certain exclusive rights. They were to raise money by which the public advantages which the Act anticipated from the erection of the intended bridge were to be secured, and they were to obtain a Parliamentary title to the enjoyment of certain rights in return. It is remarkable that the Act which incorporated them contemplated the possibility of their being unable to give to the public the expected advantages, and in that case the predecessors

Appeal. 1905.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

Fitz Gibbon, L.J.

of the defendants, the Waterford Municipal Corporation, was empowered to take their place by buying them out. The bridge has been in existence under that Act since the plaintiffs erected it at their own expense. This is but one of a number of similar Irish statutes, and some of these have become the subject of post-Union statutes, general and special.

The real question in dispute is whether the defendants, the Municipal Corporation of Waterford City, by virtue of any statute to which they can refer, have now the power of erecting a bridge across the Suir, which will seriously interfere with the rights and property hitherto enjoyed by the plaintiffs, in respect of the bridge which they built under the Act of 26 Geo. 3, without recognising any consequent liability to compensate the owners of the existing bridge for the loss that will necessarily fall upon them by the erection of a new bridge. In the changed circumstances of modern life in general, and of Waterford in particular, it may be conceded that the new bridge would be a public convenience of such importance as almost to amount to a public necessity; but this does not, of itself, raise even a presumption that a private wrong is thereby rendered lawful. Substantially the only answer which the defendants have been able to offer to the challenge to produce statutory authority for getting rid of the statutory rights of the plaintiffs, without buying them out, was a reference to the Act of 4 & 5 Wm. 4, c. 61. The defendants contend that this Act was the spring, germ, or commencement of a distinct line of legislation empowering grand juries—the public bodies then concerned—to erect bridges without regard to pre-existing rights. We are of opinion that this Act was not the beginning of anything. It is only one of a code of statutes which, both before and after it, conferred or regulated the power of interfering with existing bridge and ferry rights, but at the same time recognised the duty of purchase or compensation upon terms to be ascertained in a prescribed manner. The statutes which were in force before the Act of Wm. 4, and those which have been enacted since, were not fully referred to in the course of the arguments, and Walker, L.J., will mention them now. But striking examples of the principle that old statutory rights cannot be interfered with, except on buying them out, are to be found in the Acts relating

to the New Ross and Slaney Bridges, cases almost identical with the case of Waterford as regards the origin and definition of the bridge-owners rights; supplying precedents for buying out such rights, and statutory indications that they can not be injured or practically confiscated without compensation.

An incidental question was raised, and to some extent pressed, viz. that we should define the rights of the Bridge Commissioners, if we held them to exist, in a manner different from that in which they were defined by the order under appeal, or at least that we should make the definition more clear. We consider that the plaintiffs rights are defined, so far as Parliament thought necessary, in two sections of the statute that created them. That those two sections cannot differ in construction or effect—that they must be interpreted consistently—seems to be demonstrated by the fact that the second section expressly refers to the first, and negatives repugnancy by concluding with the words "save as aforesaid." This question relates to the geographical limits of the plaintiffs rights. It is really only a question of mapping. "Bilberry Rock" is described as the upper limit of the statutory right, and we are asked to declare whether the upper end, or the lower end, or what one might popularly call the middle, or the highest or most conspicuous part of "Bilberry Rock" is the point at which the right ends. But this question cannot be decided until it is brought to a precise issue by some specific act of interference, or alleged interference, by the erection, or threatened erection, of a new bridge at some fixed place as to which it is possible to say whether it is inside or outside the protected limits. It is now clear to everyone, and I think that it ought to have been so from the beginning, that if a modern and suitable bridge is ever erected for the public service of Waterford, it must be erected at a spot within the narrowest construction of the plaintiffs Act. That if compensation is payable at all, it ought to be applied, in the public interest, to buy out the old bridge, in order to put the new one into its place, appears clear from the confession, in the papers before us, that the erection of any sufficient and convenient bridge, in the proper place, will starve the old one to death, leaving it a danger to everybody, and useful to no one, until it rots away.

Appeal.
1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

Fitz Gibbon, L.J.

Another objection was raised to the order of the Master of the Rolls, viz.—that it is in the form of an injunction, and is so worded as to be at least capable of the meaning that it forbids the defendants from exercising what is, after all, a common right, that of asking Parliament for additional powers. When this point was mentioned, counsel for the plaintiffs said:—"We are satisfied to take a declaration of our right; that is all we ask." An injunction purporting to restrain any particular action might be evaded, or might fail to describe the precise action afterwards taken. The proceedings hitherto taken might or might not result in an infringement of any general injunction given now. We are quite willing, particularly as the plaintiffs desire to remove every possible objection of form, to convert the judgment into a declaration of right, defining the limits of the right in the very words of the Act, and accordingly we propose to declare—"That under and by virtue of the Waterford Bridge Act, 26 George 3, c. 58, the plaintiffs are entitled to the sole and exclusive right of maintaining a bridge, and to the sole and exclusive right of ferrying for hire, over the river Suir, from the quay of Waterford to the opposite side of said river, not higher up said river than Bilberry Rock, nor lower down than the entrance of St. Catherine's Pill; and that no other person or persons is or are entitled to erect any bridge, or to keep or maintain any boat or boats plying for hire, over or across the said river at any place between Bilberry Rock and St. Catherine's Pill, as aforesaid, except such person or persons as shall be licensed or appointed by the plaintiffs." That definition brings in both the sections as Parliament brought them in: first saying that the plaintiffs rights do not go beyond two points, and then saying that no person shall interfere with those rights between the same two points.

The efforts of the defendants to erect a new bridge have been founded upon a construction of the statutes, and on a contention with regard to their powers, which we hold to be unfounded, and we therefore think that the plaintiffs are further entitled to the protection of a declaration to that effect. That declaration we propose to give in these terms:—"Further declare that the erection and maintenance of a bridge for public traffic across the said river within the limits aforesaid, under any of the provisions of the

Bridges (Ireland) Act, 1834 (4 & 5 Wm. 4, c. 61), or of the Acts amending the same, without the previous purchase or acquisition, pursuant to the statutes in such case made and provided, of the property of the plaintiffs in the existing bridge across the said river, and of their rights of ferrying and of receiving tolls in respect of the said bridge, would be unlawful, and a disturbance of the rights and property of the plaintiffs, as by this order declared." That declaration will show our view of the true position of the Act of 1834, as only one of a series of statutes; and that we hold that, on the face of these statutes, purchase of the property in existing bridges was part of the obligation of the Grand Juries, and is part of the obligation of their successors, as a condition of erecting new bridges, and consequently that it is necessary to buy out existing bridges, where the exercise of the statutory powers of building new bridges infringes upon statutory rights equally protected by Parliament. We propose to discharge the order appealed from in so far as the same grants an injunction against the defendants, but, in doing so, we are merely changing the form, and in no way altering the effect of the order. We declare the right, and merely, for the present, withdraw the consequential relief by way of injunction. But we must treat the appeal as groundless in substance, and order the defendants to pay the plaintiffs costs of suit here as well as below.

WALKER, L.J.:—

The plaintiffs are the owners of a bridge and ferry, and tolls connected therewith, over the river Suir at Waterford, under certain rights and powers conferred on them by the Irish statute 26 Geo. 3, c. 58.

The defendants are the Corporation of Waterford, and they, on the 29th May, 1902, applied by memorial to the Lord Lieutenant to put in force certain provisions contained in the Bridges (Ireland) Act, 1834, and Acts amending it, for the purpose of enabling them to construct a toll-free bridge over the same river, and ascertain the proportions in which the county of Kilkenny, at the other side of the river, and certain other counties, should contribute to the project. His Excellency appointed Commissioners, of whom Mr. Sullivan, K.C., was chairman, to inquire into the merits of

Appeal. 1905. WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD. Walker, L.J.

the project. The site which the defendants then proposed for the bridge was at Bilberry Rock, some 300 yards above the plaintiffs' bridge, and it is obvious this site was proposed in order, if possible, to avoid a legal disturbance of the plaintiffs' rights. It is not necessary for the purpose of the questions before us to go into the history of the circumstances under which supplemental memorials became necessary. The Commissioners rejected the site proposed by the defendants, and recommended one which is, as they say, either on the site of, or close above, the present toll-bridge; and the Commissioners in their report expressed the opinion that a free bridge could be erected under the provisions of the Bridge Acts, as recommended by them, without incurring any liability to purchase the plaintiffs' property, or compensate them. The defendants, during the progress of the proceedings, had intimated that they withdrew their selection of the site proposed in this first memorial, and submitted the selection to the Commissioners. The plaintiffs' property being thus in peril, the present action was brought on the 16th December, 1903, against the Corporation and the Attorney-General as representing the public, and the claim prays certain declarations of right and an injunction.

The contention of the defendants is succinctly stated in their defence. In paragraph 16 they "contend and submit that a bridge such as they propose to erect, if erected at any point of the river Suir, whether within or without the limits mentioned in the plaintiffs' Act, would be no infringement of any rights which the plaintiffs might possess under their Act, 26 Geo. 3, c. 58, or otherwise, and that consequently there is no obligation or necessity to purchase or take the property in the plaintiffs' bridge, or ferries, or the tolls thereof, or to obtain any consent whatsoever from the plaintiffs to the erection or maintenance of the proposed free bridge"; and in paragraph 28 they contend that if they obtain a warrant of His Excellency under the Bridges Acts, they would be entitled to erect a bridge between the eastern end of Bilberry Rock and the plaintiffs' bridge without in any way violating any legal rights of the plaintiffs, inasmuch as the ancient ferry, and privileges incident to it, were merged in the rights conferred by the statute, and the rights as ferrymen are limited to conveyance across the river by boats.

Waterford is situate about eighteen miles from the mouth of the Suir, and the tide ascends some eighteen miles higher, and as far as Carrick-on-Suir. The city of Waterford lies on both sides of the river. There was before, and in the year 1786, an ancient ferry in private hands, from the quays of Waterford on the south side to the Kilkenny side of the river. The distance between Bilberry Rock and St. Catherine's Pill, both on the south side, is about 1700 yards, and these are taken in the Act of 1786 as the limits of what may be called the protected area. It cannot be disputed that the wooden toll-bridge, built in 1786, at a cost of, at least, £30,000, is quite insufficient to serve the needs of the present, and probably increasing, trade of Waterford, especially considering the number of railways which are being centred on both sides of the river, and no one can question the finding of the Commissioners on that subject; and for many years there has been an agitation in Waterford to have an adequate bridge, toll free, constructed, and several schemes have been projected for this purpose which proved abortive mainly owing to the plaintiffs' opposition. The plaintiffs' property in the existing toll-bridge and ferry is a very valuable one. The tolls produce some £8000 per annum, and it is not seriously disputed that a toll-free bridge in the place recommended, or even suggested, originally, would practically destroy the plaintiffs' property.

The solution of the questions before us depends on—(1) what is the true character and scope of the legislation which the defendants have appealed to for the purpose of enabling them to construct this toll-free bridge; (2) what are the rights of the plaintiffs to their bridge, and ferry, and tolls, under the Act of 1786; and (3) whether the Corporation are not bound, before constructing their bridge in the place and manner they seek, to purchase or take the plaintiffs' property and pay for it under the compulsory powers conferred by the Bridges Act of 1867, or by agreement.

We have not to consider what the consequences would be if the proposed bridge were constructed under independent Parliamentary powers, or as part of a railway system under which a bridge across the Suir was built.

In the middle of the eighteenth century there were several navigable rivers in Ireland, the only facilities for traffic over which

Appeal 1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

Walker, L.J.

were afforded by ferries, and it was naturally thought desirable to substitute bridges for them, or supplement them by bridges, and the legislation of that period supplied three modes of carrying out this policy.

One was by authorizing any owner of a ferry, except in cities and towns corporate, to erect a bridge over the river in place of the ferry, and charge the same tolls. This power appears so early as in 5 Geo. 3, c. 14; and by an Act of 1796, Grand Juries of the counties were empowered to purchase the properties of such bridges in order to open the same free of tolls for the benefit of the public, and this legislation has been continued to the present day, and reappears in the Adaptation of Enactments Order stated at p. 331 of Vanston.

The second mode was provided in 1779 by the 19 & 20 Geo. 3, c. 41, which enabled Grand Juries to receive proposals from private persons to build bridges over rivers without expense to the county (including counties of a city and town), and charge prescribed tolls, and Grand Juries of the counties were enabled to approve of the project, and a power was given to Grand Juries to raise money to redeem the tolls and thus make the bridge free. It is expressly provided that no such bridge should be built within a mile of any established or lawful ferry without consent. This power of redemption is also continued to the present day. It will thus be seen that, as against Grand Juries, the property in ferries and in a toll-bridge when built was amply protected and recognized.

The third mode was by Grand Juries, under 13 & 14 Geo. 3, c. 32, where private enterprise failed, themselves constructing bridges; but when the river formed the boundary between two counties, they could only present an equal moiety of the expense, and the adjoining county the other moiety.

During the twenty years which followed the Act of 1779, several bridges were built in Ireland over large rivers, not however under that Act, probably for financial reasons, but under special Acts applicable to each case. Two of them only require notice, one at New Ross, over the Barrow, built under an Act of 35 Geo. 3, c. 48, and the other the bridge over the Suir, with which we are immediately concerned.

This Act provides for the formation of a corporation, now the

plaintiffs, consisting of persons who would subscribe a sum of £30,000 to meet the expense of building the bridge and purchasing the existing ferry across the Suir from Waterford quay to the opposite side, or at the election of the Commissioners to compensate the ferry-owners for the damage and loss sustained by the building of the bridge. Powers were conferred to purchase the ferry, and in consideration of the expense of building and keeping in repair the bridge, power was given to levy tolls and also to keep the ferry or one or more other ferries across the river and take tolls, and they had power to lay out over what part of the river the bridge should be, provided it were not built lower down than the east side of Thomas-street, which, as appears by the map, is between the bridge and St. Catherine's Pill. The Act specifies limits within which the ferries should be established—in the 21st section "not higher up said river than Bilberry Rock, nor lower down than the entrance of St. Catherine's Pill," and then the 34th section enacts by way of prohibition, "that no person or persons shall keep or maintain any boat or boats to ply for hire over or across said river at any place between Bilberry Rock and St. Catherine's Pill as aforesaid, or carry or convey any passenger or passengers, cattle, carriages, or goods, which is or are subject or chargeable with toll or duty by this Act over or across said river," except the licensees of the Commissioners, under a penalty.

The 35th section is important, as it confers rights upon the Corporation, represented by the now defendants, by providing that if the Commissioners did not proceed with the building of the bridge within five years after they had purchased the ferry, the Corporation, the now defendants, on payment of its purchase-money and costs and expenses, might take possession of and hold it and its tolls and the right and interest of the Commissioners as fully as if the original purchase had been made by the Corporation. The duty is thrown upon the plaintiffs of watching and lighting and repairing the bridge, and the 39th section provides that "after the said bridge is finished and completed as to the said Commissioners or their successors shall seem meet, the passage over the same shall be open and be deemed and used as a common highway for ever."

This Act carefully defines and protects the rights of the plain-

Appeal. 1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

tiffs as regards the public and the Corporation. I cannot entertain a doubt that the plaintiffs under their Act were bound to keep the bridge in repair as long at least as they have tolls sufficient for the purpose, and the obligation in many cases must extend beyond that. On this point *Nicholl* v. *Allen* (1) may be referred to.

Walker, L.J.

The bridge over the river at New Ross was constructed in a manner almost identical, and with similar powers, under an Act of 35 Geo. 3, c. 48, by purchase of a ferry, save that it provides the bridge was to be at the site of the ferry; and instead of such limits as are given in the 21st and 34th sections of the Suir Act, it prohibits ferrying by others within one mile above, and one mile below, the ferry or bridge. The recognition of the rights of the New Ross Bridge owners in the much discussed Act of 1867, will be seen to be most important.

To return to the Grand Jury code, or that portion of it which deals with the construction of bridges over rivers by Grand Juries themselves: we come down to the 4 & 5 Wm. 4, c. 61, under which, and the Acts amending it, the defendants are proceeding to build a bridge within the limits mentioned in the Suir Bridge Act.

The Act is entitled, "An Act for the more effectually providing for the erection of certain bridges in Ireland," *i.e.* bridges over rivers forming the boundary between two counties.

The evils and defects intended to be dealt with are stated in the preamble, and are apparent from the perusal of the existing legislation—1, the obligation in all cases of each Grand Jury contributing one equal moiety; 2, the difference found to exist between the representatives of the counties with reference to the expediency of building or improving bridges so situated; 3, objections founded upon supposed inequality of contribution from neighbouring counties. Accordingly it provides a remedy for those cases, namely, by any Grand Jury interested presenting a memorial to the Lord Lieutenant stating the nature of the work proposed and its utility, and praying to have the powers of the Act put in force, and thereupon Commissioners are to

(1) 1 B. & S. 916.

be appointed who are to inquire into the circumstances, and to report whether it should be complied with, and to state the proportions in which the expenses should be defrayed by the counties between which the bridge was to be, and by neighbouring counties, if any. Machinery is then provided for challenging the report; and when it is confirmed, the 4th section provides that it shall be lawful for the Lord Lieutenant, if he thinks fit, by order to direct that the bridge be built, or rebuilt, and that the expenses be raised off the counties specified in the report according to the proportions recommended, and that order is a warrant to the several Grand Juries to make presentments off their counties. It is said that section authorizes, and in fact compels, the Grand Juries to disregard all existing private rights in existing bridges, ferries and tolls. What warrant is there for supposing that this Act (interpolated into the Grand Jury code) contains such an extraordinary power? All previous legislation is opposed to any such idea. It seems to me that all that the 4 & 5 Wm. 4, c. 61 did was to enable the Grand Juries to make a start, having certain specified difficulties put out of their way. But this Act, as I read the code, left Grand Juries still under difficulties in making agreements at all with Commissioners of bridges, the owners of tolls, for purchase. In this connexion the provisions of 6 & 7 Vict. c. 42 are important. The Act is no doubt primarily directed to facilitate the redemption of tolls under the 19 & 20 Geo. 3, c. 41; but it recites, "And whereas it would tend to the public advantage if the bridges on which toll is charged were open to the public free from tolls," it enables both Grand Juries and Commissioners of bridges to make agreements for the purchase of tolls payable on any bridge upon which toll is charged situate in such counties, or cities, or towns, or within five miles thereof, and gives a basis for an estimate all founded upon consent and consequential presentments.

The Act of 1867 was passed to meet the difficulty of the parties interested failing to agree on purchase-money. It is entitled, "An Act to afford further facilities for the erection of certain bridges in Ireland," *i.e.* the bridges mentioned in 4 & 5 Wm. 4, c. 61; and it recites that it is expedient to amend the same, "and to afford facilities for the purchase or taking of any

Appeal.
1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

Walker, L.J.

property in any bridge or ferry or in the tolls thereof, which may be necessary for the purposes of the said Acts"; and it then enacts that "whenever, for the purpose of making or improving any bridge, under the provisions of the said recited Acts, it shall be necessary to purchase or take the property in any bridge or ferry or the tolls thereof," the Grand Juries may consent to such purchase, and upon the consent being recorded, either Grand Jury may state in its memorial also the necessity for the purchase, and the Lord Lieutenant may include that subject in the inquiry made, and order upon it, and may make an order that the property be purchased or taken, and thereupon the Secretary of the Grand Jury presenting the memorial may proceed to put in force the provisions of the Irish Lands Clauses Act, and the purchase-money is to be deemed expenses of the work, and is to be presented for. There is nothing to limit this necessity to where the site of a bridge is taken as the base of the new bridge, or a point-to-point ferry is taken. The Act is directed to the taking of private rights compulsorily, which previously could only be acquired by agreement. The tolls, the profits derivable from bridge or ferry, are the real subject to be acquired; and, accordingly, the 29th section provides that when the work has been completed, the passage of the bridge shall be open free of all tolls. The 26th, 28th, and 29th sections of the Act are most important. The 26th section deals with the case of a bridge or ferry being situate wholly within the limits of a county or city, and enables a Grand Jury of a neighbouring county or county of a city to co-operate with such, and here the provisions of the 4 & 5 Wm. 4, c. 68, and the Act of 1867, applied to the case.

The 28th section is also important, because it deals with the case of the bridge at New Ross, constructed, as I have mentioned, under the 35 Geo. 3, c. 48, between the counties of Wexford and Kilkenny, and which it appears had been partly carried away; and it recites, "And whereas the tolls of said bridge are the property of the said Commissioners, and the right of ferry over the said river" (the Barrow) "is the property of the said Commissioners, and it is desirable that a free bridge shall be erected in place thereof, and for such purposes it is necessary to purchase the property of the said Bridge Commissioners"; and the section then

makes applicable to the Act certain proceedings of the Grand Juries of the counties of Kilkenny and Wexford already taken so as to enable the desired free bridge to be built and the value of the property ascertained—a clear legislative declaration as regards the New Ross bridge.

The 29th section is still more important, because it provides for the case of the possible purchase of the very bridge and ferry we are now dealing with, and enacts that if hereafter the purchase of the bridge and ferry at Waterford comes to be entertained by the counties of Waterford and of Kilkenny, as a co-operating county, under section 26, the memorial for proceeding with the purchase must first have been adopted by a majority of the rate-payers for the borough of Waterford. This seems to me a clear legislative declaration as to the rights in the bridge, and ferry, and tolls, now vested in the plaintiffs, as against those seeking to put in force the provisions of 4 & 5 Wm. 4, c. 61, and the Act of 1867.

I do not think the Act of 1875 throws any additional light on the case.

Some argument was founded by the appellants' counsel on the decision in *New Windsor Corporation* v. *Taylor* (1), but it has no application. It is immaterial for the purposes of the Commissioners whether their rights to the ferry are founded on a franchise properly so called, or on the statutory right which took its place, to say the least of it, under the Act of 1786, and this statutory right is living and unrepealed, and the question is, Can the appellants, under the Acts of 1834 and 1867, build the bridge contemplated without taking the ferry right and tolls? and I think it is obvious they cannot. The decision in *Leamy* v. *Waterford and Limerick Railway Company* (2) is, I think, a clear authority that the Commissioners' right of ferry within the protected area cannot lawfully be disturbed.

For the same reasons the question does not arise discussed in *Hopkins* v. *Great Northern Railway* (3), viz., whether the building of a bridge can at all interfere with ferry rights? because disturbance of ferry rights must be limited to boats. The Act of

(1) [1899] A. C. 41. (2) 7 Ir. C. L. R. 27. (3) 2 Q. B. D. 224.

Appeal. 1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

Walker, L.J.

1867 contemplates, for purposes under that Act, interference with ferries by a bridge.

Nor can *Hopkins' Case* (1) have any application, so far as it decides that compensation cannot be given under the Lands Clauses Act. There is no doubt a question is suggested in that case, though it did not arise, whether the grantee of tolls of a bridge can bring an action for loss of traffic caused by the erection of another bridge under Parliamentary powers. The answer here is that the Act of 1867 contemplates the very case of bridges constructed under its code, and provides for it; and the whole code to which I have called attention, including the recognition of the bridge rights in the Act of 1867 itself, points in the same direction.

It will be time enough to consider the plaintiffs' rights which may arise when the defendants, the Corporation, have built a toll-free bridge under independent Parliamentary powers, or have built one really outside the protected limits.

That the proposed bridge would in fact destroy the plaintiffs' traffic and their property in the tolls is self-evident, and was not disputed. We do not see our way to granting an injunction, but we will make a declaration of the plaintiffs' rights which will express our opinion that the defendants cannot proceed to build a bridge under the powers conferred by 4 & 5 Wm. 4, c. 61, and the Acts amending it, without purchasing the plaintiffs' bridge, ferry, and tolls, or otherwise compensating them.

HOLMES, L.J.:—

Previous to the year 1786, the only means of communication between the northern and southern banks of the river Suir, where it flows through the county of the city of Waterford, was a ferry, granted by Letters Patent of King William III. to James Roch. To remove the inconvenience arising from such an unsatisfactory mode of transit, and to promote the trade of one of the most important ports in the country, the Act 26 Geo. 3, c. 58, was passed by the Irish Parliament. This statute is marked by the cursive style and ample detail to be found in the legislation of an age in which Parliamentary criticism and

(1) 2 Q. B. D. 224.

obstruction had not developed; but its material provisions can be condensed into a few sentences.

It authorised certain persons to open a subscription of £30,000, to be raised by the issue of debentures of £50 each for building a bridge across the Suir; and incorporated the subscribers by the name appearing in the title of this action, conferring on them power to purchase Roch's ferry, to build a bridge across the river on a site to be selected by them, west of Thomas-street, to take specified tolls from persons passing over the bridge, to maintain the purchased ferry, or to establish other ferries within defined limits, and to receive tolls for crossing such ferry or ferries not higher in amount than the tolls leviable for passing the bridge. Inferentially the duty of maintaining the bridge, which is to be deemed and used as a common highway for ever, is imposed upon the Commissioners, who are directed to divide the surplus produce of the tolls rateably between the debenture holders every six months, for ever. Remedies for enforcing the tolls are provided, and there is a prohibition, under penalty, of any person keeping boats to ply for hire between the limits previously defined without a license from the Commissioners.

Within a few years after the passing of this Act the £30,000 were subscribed, the ferries purchased, and the bridge built; and it has been since maintained by the plaintiffs. It was probably considered a great undertaking when it was completed, but it is not suited for modern traffic; and the fact of a toll-bridge being the only mode of ingress to Waterford, from the north, is a serious obstacle to the commercial development of the city. Efforts have been made from time to time to substitute for the present wooden structure a modern free bridge. Up to a few years ago these efforts assumed that the plaintiffs had rights under the Act of 1786, which it would be necessary to purchase or give compensation for, before a new bridge could be erected; but in 1902 the defendants instituted certain proceedings under a statute passed, 4 & 5 Wm. 4, c. 61, as subsequently amended, for building a bridge across the Suir, without making any provision for indemnifying the plaintiffs against the loss that would be thus inflicted on them. Their project took different shapes at different times; but when the present action was begun, it was confined to building a

Appeal. 1905.

WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD.

Holmes, L.J.

free bridge within 50 feet of the existing structure, which, if carried out, would not only deprive the plaintiffs' debentures of all value, but would render it impossible for them to perform the statutory duty of maintaining their bridge as a public highway for ever. In this state of things this action was brought for the purpose of obtaining a declaration that the erection and maintenance of the proposed bridge would be an interference with the rights of the plaintiffs under the Act of 1786, and a disturbance of their ferries. I am aware that the relief claimed by the plaintiffs is set forth in wider terms than I have stated it, and that, in addition to a declaration of right, an injunction is asked for. But I propose to deal with the case on the narrower basis I have mentioned, which Mr. Ronan admits is sufficient for the protection of his clients.

I start with a proposition that has not been, and cannot be, challenged—without statutory authority the defendants are not entitled to build a bridge; and such authority, if it exists at all, is to be found in one or more of the statutes prescribing and defining such powers and duties of Grand Juries as are now vested in county councils and in the mayor, aldermen, and burgesses of county boroughs. Irish Grand Juries were empowered by statute from a very early date to erect bridges and pay the cost thereof by county assessments. The general Act containing provisions of this kind in force in 1786 was 13 & 14 Geo. 3, c. 32, section 15 of which authorised the building of a bridge within a county, and section 17 a bridge over a river that was the boundary between two counties. In this case, each county was to bear one-half the cost. A new Grand Jury Act was passed by the Irish Parliament in 1796, repealing all previous statutes on the same subject, and containing sections as to building bridges, practically identical with those I have quoted from the earlier Act. Similar provisions are to be found in 6 & 7 Wm. 4, c. 116, the Act that was in force when the Local Government (Ireland) Act, 1898, transferred the power and duties of Grand Juries in relation to roads and bridges to county councils and to the municipal corporations of county boroughs. Sections 56 and 57 of this Act do nothing more than repeat the previous provisions as to bridges.

There is strong evidence to be found in the Irish legis-

lation of the last quarter of the eighteenth century that, notwithstanding the powers conferred upon Grand Juries, the country suffered from a want of bridges, and efforts were made from time to time to meet this want. For example, section 20 of 13 & 14 Geo. 3, c. 32, provides that, except in cities and towns corporate, a ferry-owner might erect and support at his own expense a bridge in the place of the ferry, and receive for passing over such bridge the same toll as he was entitled to receive for passing over the ferry. A section in the same terms is contained in both earlier and later statutes. Another project for having bridges erected by private enterprise was legalised by 19 & 20 Geo. 3, c. 41. After a remarkable recital of the reluctance of Grand Juries to present for the building of necessary bridges, and after further reciting that private persons might often be induced to undertake the risk and expense of erecting and maintaining a bridge if they were allowed by law a reasonable toll for passing over the same, elaborate provision is made for private individuals arranging with Grand Juries to build bridges and to receive tolls from persons using them. No such bridge was to be erected within a mile of a ferry without the consent of the owner thereof; and after forty-one years the Grand Jury was declared entitled to redeem the tolls on certain specified terms.

In addition to these enactments, which were applicable to all Ireland, there were several Acts relating to the building of a bridge over a particular river very similar to the Waterford Act of 1786. In the same year Parliament authorised the building of the North Bridge over the Lee in Cork. In 1790, authority was given for building a bridge over the Foyle in Londonderry; and in 1794, an Act was passed, which, amongst other things, provided for the erection of two bridges across the Slaney in county Wexford. These statutes differed in details; but they had one thing in common, namely, that the necessary funds were to be raised on the security of tolls.

It will thus be seen that the Irish Parliament devised four ways for supplying the country with bridges—(1) They might be built by a Grand Jury, or by two Grand Juries, with money levied from the county or counties; (2) or by ferry-owners in considera-

Appeal. 1905.

WATERFORD BRIDGE COMMRS. v. CORPN. OF WATERFORD.

Holmes, L.J.

tion of their continuing to receive from the persons using them the tolls previously payable for conveyance by the ferries; (3) or by private individuals out of their own resources, in consideration of tolls for passage pursuant to arrangements with Grand Juries; or (4) by corporate bodies authorised to borrow the necessary funds on the security of tolls. Is it possible to believe that a Grand Jury under the general authority conferred on them had power to destroy the income of a toll-bridge erected by a ferry-owner, a private individual or a corporate body, pursuant to the enactments in that behalf, by placing beside it a free bridge paid for out of county rates? I answer, No; and I think that evidence of this appears in successive statutes. I have already referred to the right conferred on a Grand Jury to redeem the tolls on a bridge erected by private enterprise after forty-one years. A similar provision is to be found in subsequent statutes; but it will be enough to refer to the Act of 1836, sections 120 and 121, which are still in force. Section 120 enables a Grand Jury to make presentment for the purchase of the property in a bridge erected by a ferry-owner, in order to open the same free of tolls for the benefit of the public. Section 121 enables a Grand Jury to redeem the tolls payable in respect of bridges erected by private individuals under 19 & 20 Geo. 3, c. 41. By the Act 6 & 7 Vict., c. 42, fuller powers for the same purpose are given to Grand Juries. These enactments, in my opinion, show clearly that where tolls were created under Parliamentary authority for the purpose of inducing private individuals to advance their money to build a bridge, Grand Juries were inferentially prohibited from erecting a free bridge to the prejudice of the toll-owners. I am not sure that this is disputed by the defendants' counsel, so far as regards the independent action of a Grand Jury. I asked more than once did they argue that the Grand Jury of the County of the City of Waterford could of their own motion, at any time after the bridge had been built, have erected, within fifty feet of it, a free bridge by means of money raised by presentment; but I noticed that there was an indisposition to give a definite answer to the question. Yet it seems to me to be a matter of vital importance in the case. If to do this would have been a violation of the plaintiffs' rights, I am satisfied that it cannot be done through the machinery pro-

vided by 4 & 5 Wm. 4, c. 61, upon which, as amended, the defendants chiefly, if not altogether, rely, and under which they took the steps that led to this action.

The object of that statute appears from the preamble. By the law then existing, the expenses of building a bridge over a river which was the boundary of two counties could only be defrayed by the counties in equal shares. A frequent result of this was a difference with respect to the expediency of the undertaking between the two Grand Juries, one asserting that their county would derive comparatively little advantage from it, while neighbouring counties that could not be called on to contribute would largely share in the benefit. To remove these difficulties, a Grand Jury desirous of having such a bridge erected, is authorised to present a memorial to the Lord Lieutenant stating the nature of the work proposed, and the reasons for which the same is considered to be desirable, and praying that the powers of the Act should be put in force. The Lord Lieutenant is then empowered to appoint a committee or commission to enquire into the expediency of complying with the memorial, and into the proportions in which the expenses thereof should be defrayed by the two counties between which the bridge is to be erected, and by such neighbouring counties, if any, as ought to be contributory to the expenses. I do not propose to examine in detail the several steps prescribed, but I have satisfied myself that the sole object of the Act was to provide machinery for the building of a bridge over a river which might have been erected theretofore by two Grand Juries, but to which objection had been taken by one of those bodies. I have no doubt that it was not intended to interfere with bridges that had been erected by private enterprise, or to prejudice the rights of persons who had advanced their money upon the security of tolls created by statute. One thing that convinces me of this is, that while care is taken that the Grand Jury of every county that may be affected by the order of the Lord Lieutenant is to have notice of the proceedings, and a right of appeal to the Privy Council, neither notice nor appeal is given to the proprietors of a toll-bridge, whose property, created by Parliament, might be rendered valueless by a competing undertaking. Still stronger evidence of this is given

Appeal. 1905. WATERFORD BRIDGE COMMRS. *v.* CORPN. OF WATERFORD. Holmes, L.J.

by the amending Act of 1867, 30 & 31 Vict. c. 50. The bridge at Waterford was not within the provisions of 4 & 5 Wm. 4, c. 61, inasmuch as it did not connect two counties. Section 26 of the Act of 1867, taken in connexion with the (Bridges) Ireland Act, 1875, amended the previous statute in this respect; but this is merely an incidental provision in an Act, the principal object of which was to enable Grand Juries to acquire by compulsory purchase the property in any bridge, ferry, or the tolls thereof, whenever it was necessary to do so for the purpose of building a new bridge, or improving the existing one. There was no necessity for this legislation if a Grand Jury could have obtained power under 4 & 5 Wm. 4, c. 61, to erect a bridge beside a bridge in respect of which tolls were payable under earlier statutes. The Act of 1867 was intended to be applied in cases like that of the Waterford Bridge, where an old and defective structure had become insufficient for modern needs. Indeed the concluding clause of the last section contains a special enactment regarding the purchase of the bridge and ferry of Waterford, thus showing that the acquisition thereof by the Grand Juries of the adjoining and neighbouring counties was within the contemplation of the Legislature. Even so late as 1896, a section in a private Act passed in that year (59 & 60 Vict. c. cxxv.) authorises the continuance of tolls after the purchase of the Waterford Bridge under the Act of 1867 for a limited time, and for certain specified purposes.

The result, therefore, of my consideration of the questions arising in this appeal, leaves in my mind no doubt that once the ferry was purchased and the bridge built at Waterford, pursuant to the Act of 1786, the Grand Jury of the County of the City ceased to have authority to build a bridge within the limits prescribed for the protection of the plaintiffs' ferries; that no statute since passed has enabled the Grand Jury of their own motion to build such a bridge; that the machinery of 4 & 5 Wm. 4, c. 61, could not have been used for this purpose previous to the Acts of 1867 and 1875; and that, notwithstanding the amending provisions contained therein, such provision can only be now applied if the purchase of the existing bridge, ferries, and the tolls thereof, is included in the project. It follows that the defen-

dants, who now stand in the same position as the Grand Jury of the County of the City of Waterford before recent legislation, are not entitled to build a bridge across the Suir in the place and in the manner contemplated, and that, as against them, the plaintiffs are entitled to a declaration in the terms that have been read. Mr. Ronan believes that an injunction is not necessary for the protection of his clients; and as we think that there is a technical objection to the terms of the injunction granted by the Master of the Rolls, we do not propose to include it in our judgment.

Solicitors for the plaintiffs: *Dobbyn & M'Coy.*
Solicitor for the Corporation of Waterford: *James Feely.*
Solicitor for the Crown: *R. G. Warren.*

R. D. M.

HENDERSON *v.* HENDERSON.

Kenny, J. (*for M. R.*).
1904.
June 2, 17.

1904. No. 362.

Description—Name—Surrounding circumstances—Will—Latent ambiguity—Extrinsic evidence.

A testator gave property on trust for "his grandsons Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or he shall attain twenty-one years."

One of testator's grandsons was named Robert William Henderson, son of Oliver Henderson. Testator left two other grandsons (the sons of a deceased son) named William Robert Henderson and John Barnett Henderson.

Held, that extrinsic evidence was admissible to show that William Robert Henderson was the person really intended in the will.

ADJOURNED SUMMONS.

By his will, dated 10th August, 1901, John Henderson bequeathed all his property to trustees in trust for conversion, and as to the proceeds thereof, after payment of testator's debts and certain pecuniary legacies, and an annuity of £100 to his wife, upon trust "for my grandsons, Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or

Kenny, J. (*for M. R.*). 1904.

HENDERSON v. HENDERSON.

he shall attain the age of twenty-one years, and in case they or he shall not attain the age of twenty-one years, then in trust for my daughters Mary Stewart and Grace Gray."

The testator died June 4th, 1903. He left (amongst other grandchildren) three surviving grandsons, one named Robert William Henderson, a son of testator's son, Oliver Henderson. Two other grandsons were named William Robert Henderson and John Barnett Henderson, sons of a deceased son of testator named Robert William Marshall Henderson.

The will contained this recital:—"As I have recently given to my son Oliver Henderson the sum of £1023, which I consider an ample provision for him, I do not leave him anything by this my will." The legal question arising for decision was—as to whether extrinsic evidence was admissible to show that William Robert Henderson, the brother of John Barnett Henderson, was the person intended to be a beneficiary under the will of the testator, and not Robert William Henderson, the son of Oliver Henderson.

Jellett, K.C., and *Gaussen*, for the executors and trustees of the will of John Henderson.

Wylie, K.C., *Henry, K.C.*, and *Glover*, for William Robert Henderson:—

In order that the Court may be placed in the position of the testator, and so ascertain the proper application of the language he has used, extrinsic evidence is admissible to show the surrounding facts and circumstances and habits of the testator at the date of his will, and what was his knowledge of the surrounding circumstances, and the names by which persons having a claim on his bounty were known to him. The evidence in this case raises a question of latent ambiguity on the will, even although there is a person precisely answering the description in the instrument: *Charter* v. *Charter* (1); *Grant* v. *Grant* (2); *Andrews* v. *Andrews* (3). In *The Goods of Ashton* (4) extrinsic evidence was admitted for the purpose of showing that an illegitimate son of testator's sister was

(1) L. R. 7 H. L. 364.
(2) L. R. 5 C. P. 380, 727.
(3) 15 L. R. Ir. 199.
(4) [1892] P. 83.

intended by the description "my nephew, George Ashton." On the question of construction: see *Seale-Hayne* v. *Jodrell* (1). In *In re Wolverton Mortgaged Estates* (2) (as in this case) there was only one person precisely answering the description in the will, yet parol evidence was admitted to show that he was not the person really intended to be benefited.

[Counsel also referred to *In re Taylor; Cloak* v. *Hammond* (3); *In re Noble's Trusts* (4); *Healy* v. *Healy* (5); *Doe* d. *Hiscocks* v. *Hiscocks* (6); *Doe* d. *Allen* v. *Allen* (7); *In re Feltham's Trusts* (8); *Flood* v. *Flood* (9).]

T. Pakenham Law, K.C., and *Patchell, K.C.*, for Robert William Henderson:—

There is no latent ambiguity, and extrinsic evidence is not admissible. On the face of the will there is no ambiguity. There is a person who precisely answers the description in the will. To admit parol evidence in this case would be to create an ambiguity: *Bernasconi* v. *Atkinson* (10).

In *Grant* v. *Grant* (11) there was a latent ambiguity because there were two persons of the same name, either of whom would answer the description in the will *nominatim*. Here there is only one Robert William Henderson. *In re Wolverton Mortgaged Estates* (2) merely shows that Tom is the same name as Thomas. There was a latent ambiguity which had to be explained, and in that case, and in *Charter* v. *Charter* (12), it appeared from the wills in question that the persons *prima facie* answering the description were not the persons intended. In *Cloak* v. *Hammond* (3) neither claimant was correctly described in the will: Wigram on Extrinsic Evidence, Propositions i., ii., iii., v.; *Delmare* v. *Robello* (13); *In the Goods of Peel* (14); *Holmes* v. *Custance* (15); *Phelan* v. *Slattery* (16).

(1) [1891] A. C. 304.
(2) 7 Ch. Div. 197.
(3) 34 Ch. D. 255.
(4) Ir. Rep. 5 Eq. 140.
(5) Ir. Rep. 9 Eq. 418.
(6) 5 M. & W. 363.
(7) 12 Ad. & El. 451.
(8) 1 K. & J. 528.
(9) [1902] 1 I. R. 538.
(10) 10 Ha. 345.
(11) L. R. 5 C. P. 380, 727.
(12) L. R. 7 H. L. 364.
(13) 1 Ves. Jun. 412.
(14) 2 P. & D. 46.
(15) 12 Ves. 279.
(16) 19 L. R. Ir. 177.

Kenny, J. (*for M. R.*). 1904.

HENDERSON *v.* HENDERSON.

June 17.

[See also the following cases:—*In re Fish*; *Ingham* v. *Rayner* (1); *Wells* v. *Wells* (2); *Sherratt* v. *Mountford* (3); *Miller* v. *Travers* (4); *Dawson* v. *Higgins* (5).]

KENNY, J.:—

The question for decision on this originating summons arises on the will of the late Mr. John Henderson, who died on the 4th June, 1903. At the date of his death he had two grandchildren, the one named William Robert Henderson, and the other John Barnett H. Henderson, both being children of testator's deceased son, Robert William Marshall Henderson. He had also a grandson named Robert William Henderson—one of several children of testator's son, Oliver Henderson. This Oliver Henderson survived his father. By his will dated the 10th August, 1901, the testator bequeathed all his property to trustees in trust for conversion, and as to the proceeds, after discharging his debts and pecuniary legacies, and an annuity of £100 to his wife, in trust for his "grandsons, Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or he shall attain the age of twenty-one years; and in case they or he shall not attain the age of twenty-one years," in trust for testator's daughters, Mary Stewart and Grace Gray. The will contained a maintenance and education clause which empowered the trustees to pay the income of the share coming to a grandson "to the parent or guardian of my said grandsons respectively"; but I am not inclined to attach any weight to it as an explanatory context. The will also contained a recital that as the testator had recently given to his son, Oliver Henderson, the sum of £1023, which he considered an ample provision for him, he did not leave him anything by his will. *Prima facie* the testator's grandson, Robert William Henderson, son of testator's son, Oliver, is the person designated by the will to take the bequest in conjunction with John Barnett Henderson. But a claim has been made on behalf of William Robert Henderson, the brother of John Barnett Henderson, that he should be

(1) [1894] 2 Ch. 83.
(2) L. R. 18 Eq. 504.
(3) L. R. 8 Ch. 928.
(4) 1 Mo. & Sc. 342.
(5) [1900] 2 Ch. 756; [1902] A. C. 1.

regarded as the beneficiary who was contemplated by the testator, notwithstanding that his name is William Robert, and not Robert William. In other words, it is suggested that there is a latent ambiguity in the will, and that extrinsic evidence of the testator's intention is admissible. On such a claim as this the initial matter for consideration is whether a latent ambiguity exists at all. If there be none, no extrinsic evidence of intention can be given. But, in order to ascertain whether there is a latent ambiguity, whether, in fact, the words of the will are applicable indifferently to more than one person, evidence of the surrounding circumstances and of the state of knowledge and belief of the testator is admissible. It would be mere pedantry to refer in any detail to the authorities for this proposition. It will be found broadly stated in all the text-books on wills: Wigram, Hawkins, Jarman, and Theobald, and in *Re Feltham's Trusts* (1). In *Charter* v. *Charter* (2), although the Lords were equally divided on the question whether a latent ambiguity was created after evidence of surrounding circumstances had been given, there was no doubt expressed by any of the Lords as to the admissibility of such evidence, and at p. 377 the Lord Chancellor, Lord Cairns, states the grounds for its admission in the following language:—"There is a class of evidence which, in this case, is clearly receivable. The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and the application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied."

The principle was recognised in *Cloak* v. *Hammond* (3) and in *Dawson* v. *Higgins* (4). In the latter case its application was expanded in the dissenting judgment of Rigby, L.J., who, at p. 763, says: "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent

(1) 1 K. & J. 528.
(2) L. R. 7 H. L. 364.
(3) 34 Ch. D. 255.
(4) [1900] 2 Ch. 756.

Kenny, J. (*for M. R.*). 1904. HENDERSON *v.* HENDERSON.

fact: Wigram (3rd ed., pl. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction imposed upon it by extrinsic evidence, I by no means undertake to assert that in point of fact this has never been done. Before the publication of Sir James Wigram's treatise there probably were, and subsequently there possibly may have been, instances of the kind. All such instances, however, must be attributable to the result of an unconscious though illegitimate yielding to the almost necessary bias in favour of a particular intention indicated or suggested by extrinsic facts as distinguished from the explanatory effect of such facts on the words of the will under discussion."

Dawson v. *Higgins* went on appeal to the House of Lords (1) where the judgment of Rigby, L.J., was affirmed, and the decision of the Court of Appeal reversed. The Lord Chancellor, Lord Halsbury, in giving judgment, says, at p. 5:—"The observations of very learned Judges have been quoted to show that you must read all the words in every instrument with reference to the circumstances under which they are uttered or written. In one sense that is quite true. It is quite true that, where you are finding out persons or things—who are the persons designated by the will, what are the things left by the will—you may find either the person or the thing by proper external evidence of what is referred to."

Finally the rule has been applied in this Court by the Master of the Rolls in *Flood* v. *Flood* (2), when he states, at p. 545, that "the employment, at least if it be habitual, by a testator of doubtful words in a particular sense is a fact provable by parol evidence, not to contradict but to explain ambiguous or otherwise insensible expressions; and so I think that the previous will, codicil, and draft-codicil are admissible for that purpose, though I do not go further than that."

The general principle is therefore plain, and in simple cases there can be no difficulty in applying it. Thus, a gift to testator's

(1) [1902] A. C. 1. (2) [1902] 1 I. R. 538.

grandson, Robert, is unequivocal and unambiguous, as it thus appears. But on investigation of the state of testator's family, it may be discovered that he has two grandsons named Robert. At once the destination of the legacy, which was hitherto perfectly clear, becomes uncertain and indefinite. The uncertainty is caused, no matter how you may regard it, by a piece of extrinsic evidence. With that evidence it may still be impossible to identify the object of testator's bounty; but without it, it will be absolutely impossible to do so. Therefore, the very first point to be determined is, whether each of the claimants fills and satisfies the description of the particular person as such description appears on the face of the will? In the case I have put, the fact of the existence of two grandsons named Robert at once places each of them in the position of answering the description. The fact of there being two grandsons of the same name is arrived at by extrinsic evidence. That is a plain case; and according to settled authority a latent ambiguity is disclosed, and evidence of intention is at once admissible. But if in the case I put, instead of there being two grandsons both bearing the same name, it appeared that one did not really bear the Christian name of Robert, but had either adopted it, or was in the habit of being called by that name by the testator—or was habitually known in the family circle as Robert—or even by its abbreviation Bob—is that evidence to be excluded simply because the other claimant exactly fits into the words of the will? I think not, and I think so because it seems to me to be just as much evidence of surrounding circumstances as the naked bit of evidence that two persons of the same name were in existence. Furthermore, if such evidence were rejected, the cases of *Re Feltham's Trusts* (1); *Charter* v. *Charter* (2); *Wolverton Mortgaged Estates* (3); *Cloak* v. *Hammond* (4), and *In Goods of Ashton* (5), could never have been decided as they have been. In *Charter* v. *Charter* (2) the beneficiary named in the will was testator's son, "Foster Charter." He left two sons—one named William Foster Charter, and the other Charles Charter; and from the general context of the will and evidence of the surrounding circumstances, it was held that Charles

(1) 1 K. & J. 528.
(2) L. R. 7 H. L. 364.
(3) 7 Ch. Div. 197.
(4) 34 Ch. Div. 255.
(5) [1892] P. 83.

Kenny, J. (*for M. R.*). 1904.

HENDERSON v. HENDERSON.

Charter was the person indicated, and not William Foster Charter, notwithstanding that the name Foster was portion of his entire name, and did not appear in that of his brother. In *Wolverton Mortgaged Estates* (1) it became necessary to establish the identity of a "Mr. Thomas Fisher, Bridge-street, Bath." There was in existence a Mr. Thomas Fisher, of Bridge-street, Bath, who thus exactly fitted the full description in the will, yet it was held by Malins, V.-C., that a son of that Mr. Fisher, whose name was Henry Tom Fisher, and who sometimes lived with his father, was the person really contemplated. In *Cloak* v. *Hammond* (2) the legatee, as described in the will, was "my cousin, Harriet Cloak." Testatrix had a cousin who was married, but whose maiden name had been Harriet Cloak. There was another claimant, namely, a Harriet Cloak, who was *not a cousin* of the testatrix, but was married to a cousin of hers, yet she was held to be entitled, to the exclusion of the lady who really filled the description of cousin, and whose maiden name corresponded with that in the will. Again, in *The Goods of Ashton* (3), a person completely satisfying the description of "my nephew, George Ashton," was, on the context of the will and the extrinsic evidence, rejected in favour of an illegitimate nephew of the same name. No doubt the context of the will in that case formed a large element in the determination of the question of latent ambiguity, and but for it the decision would seem to be opposed to that of the Court of Appeal in the subsequent case of *Ingham* v. *Rayner* (4). These cases, in my opinion, establish that the fact of one of several claimants completely answering the description in the will does not preclude the admission of extrinsic evidence to show that another might be regarded as also coming within that description, as the latter was understood by the testator, though not in fact actually filling it in all its parts. I, therefore, think that apart altogether from evidence of intention, proof of what the testator knew and thought and expressed was admissible to establish the possibility of the grandson, William Robert, answering the description of "my grandson, Robert William Henderson," though his real name was William Robert.

(1) 7 Ch. D. 197.
(2) 34 Ch. Div. 255.
(3) [1892] Prob. 83.
(4) [1894] 2 Ch. 83.

The evidence relied on for this purpose is this:—Mr. Venables, a solicitor, took instructions from testator for his will on the 18th October, 1897. On that occasion the testator expressed his intention of leaving £500 each to his two grandsons, whom he described as "Robert Henderson and John Barnett Henderson," and Mr. Venables so took down his instructions in writing. On the 9th August, 1898, Mr. Venables had another interview with the testator, and they had before them the original memorandum of the 18th October, 1897. Considerable alterations in that memorandum were then made, and in the course of making them the testator informed Mr. Venables that his grandsons, Robert William and John Barnett Henderson, were the sons of testator's deceased son, Robert William Henderson. The record of this statement appears on the face of the memorandum, in Mr. Venables' writing, and I have no reason to doubt its authenticity, or that it was written at the interview I have referred to. A will was executed in accordance with these instructions on the 15th August, 1898. About two and a half years afterwards, namely, on the 30th March, 1901, the testator had a third interview with Mr. Venables as to making a new will, and on that occasion again referred to his grandsons as the sons of his son Robert. It also appears from an affidavit of the testator's widow, Ellen Henderson, that testator's son, Robert William Henderson, died in May, 1892—that from the time of his death his widow and his two sons, the said William Robert Henderson and John Barnett Henderson, were supported by the testator, and resided with him up to about three or four years ago, when their mother went to live for a while at Portrush—that the testator then made her an allowance for the maintenance of the two boys—that he sent them to school at his own expense, and that they spent their holidays with him—that the testator always called the elder of the two boys "Robert," or "Bob," or "Bobbie," and that the boy was called "Bob" by his mother and all others about the place, while Robert William Henderson, Oliver's son, was called Bertie. The next affidavit in importance is that of Mrs. Twigg, the mother of these boys (she has married a second time), in which she corroborates Mrs. Ellen Henderson's account of the relations between the testator and her two sons, and in addition makes an

Kenny, J. (*for M. R.*). 1904.

HENDERSON v. HENDERSON.

exhibit of a letter in the handwriting of the testator, dated the 9th March, 1899, to her son William Robert, in which the testator addresses him as "My dear Bob." The envelope of this letter is also exhibited, and the address on it is "Master R. W. Henderson, care of Mrs. Brown, 89 Fitzroy-avenue, Belfast." Mrs. Twigg and her son were then at this address on a visit. The envelope is not in the handwriting of the testator, but in that of a Miss Geoffrey, who was an assistant in testator's shop, and it bears a postmark of the same date as that of the letter. A Mr. Darragh, one of the trustees of the testator's will, deposes that testator always called these grandsons Bob and Jack. This is confirmed by testator's coachman, William Latimer. In thus stating what I conceive to be the evidence of surrounding circumstances, I have kept out of view a considerable body of evidence as to the relations between the testator and his son Oliver and his grandchildren, inasmuch as it was difficult, if not impossible, to refer to it without the introduction at the same time of statements of intention; but on the evidence I have set out, I am of opinion that the testator was accustomed—either through accidental error, or from the force of habit, or as a pet-name—to refer to William Robert by the name of Bob or Bobbie, and at least on one occasion as "R. W." I, therefore, think that a latent ambiguity has arisen with reference to the identity of the legatee, Robert William Henderson, and that further extrinsic evidence is admissible, namely, proof of the testator's intention. On that question of intention the evidence is all one way. It is absolutely clear from other portions of the affidavits to which I have referred, and from other evidence in the case which I need not enter into in detail, that the grandson whom the testator contemplated under the description of "my grandson Robert William Henderson" was William Robert Henderson, the son of his deceased son, Robert William Henderson, and I shall so declare by my order.

All parties will have their costs.

Solicitor for the trustees: *Venables.*

Solicitors for Robert William Henderson: *Richardson & Synnott.*

Solicitor for other parties: *Simmonds.*

R. W. L.

In re FLEETWOOD RYND'S ESTATE.

Ross, J.
1905.
Feb. 17, 21.

Land Judge—Landlord and tenant—Land Purchase Acts—Tenancy—Real or fictitious—Tenancy created for purposes of sale—Bona fide *tenant—Untenanted land—Insolvent estate.*

Untenanted lands, held under lease, and forming part of an insolvent estate, were divided into lots and put up for sale, subject to the approval of the Land Judge, each lot being subject to a rent fixed by the Receiver. In the particulars it was stated that "each lot offered for sale consists of a yearly tenancy pending the matter, to be created under the Court, together with the benefit of an agreement to be entered into for the purchase of the fee-simple under the Land Purchase Acts, at a price fixed at twenty-three years' purchase of the rent of the tenancy."

Immediately after the sale the buyer of each lot signed a memorandum, by which he proposed and agreed to become tenant from year to year under the Court upon the terms specified, and further agreed (in case his proposal was accepted by the Judge) to purchase the lands in fee-simple under the Land Purchase Acts at the price mentioned.

Upon the matter coming before the Land Judge for his approval, he refused to sanction the proposals for tenancies or agreements to purchase, as the proposed tenancy in each case was a mere fiction, the purchaser of each lot becoming in equity, under the contract, the purchaser of the fee-simple at the same moment as he became tenant.

Goodbody's Estate (32 I. L. T. R. 87) approved and followed.

By lease of December 17, 1851, Marcus Tuthill and Robert Tuthill demised the lands of Mount Armstrong, containing about 326 acres, to Christopher Rynd for the term of 170 years, at the yearly rent of £214 18*s.* 11*d.* The lease contained a covenant by the lessee not to assign, sublet, or sub-divide the demised lands and premises (without consent) in less portions than 25 acres, excepting by way of demise to Sir Gerald Aylmer or his representatives. There was also a covenant to keep the demised premises and all houses, edifices, buildings, trees, fences, hedges, ditches, plantations, enclosures, and improvements, in good, sufficient, tenantable order and repair, and at the end or determination of the term to yield up possession of the premises in like good, sufficient, tenantable order and repair. There was also a cove-

Ross, J. 1905.

In re Rynd's Estate.

nant to keep the house of Mount Armstrong insured. The entire of the lands demised (with the exception of about 37 acres, occupied by the Aylmer family) was occupied by the lessee in connexion with the residence of Mount Armstrong, and there were on the lands two fox covers and extensive plantations. Subsequently the interest of Christopher Rynd became vested in Fleetwood Rynd, who continued in occupation of the residence and lands till shortly before his bankruptcy in 1901.

An absolute order for sale of the lands demised by the lease (with others) was made on the petition of an incumbrancer, and a receiver over the estate and interest of Fleetwood Rynd was duly appointed, and the entire of the lands held under the lease of 1851 (except the portion occupied by the Aylmers) were in his hands. By order, dated December 12, 1904, it was ordered that the receiver should be at liberty to put up for sale by auction, or to advertise for proposals for, tenancies under the Court, of the lands of Mount Armstrong then in hand, subject to the condition that each purchaser should enter into an agreement to purchase his division under the Land Purchase Acts. In pursuance of this order these untenanted lands, comprising 289 acres, were divided into eight lots, one lot consisting of the residence, gardens, and out-offices of Mount Armstrong. Each of the lots contained more than 25 acres. Prior to the auction the receiver fixed a rent on each lot. In the particulars of sale it was described as being a sale of attractive Court tenancies in suitable and convenient divisions with a view to purchase by the tenants of the fee-simple of their holdings. The particulars stated that "each lot offered for sale consists of a yearly tenancy pending the matter to be created under the Court, together with the benefit of an agreement to be entered into for the purchase of the fee-simple of the tenancy under the Land Purchase Acts, at a price fixed at twenty-three years' purchase of the rent of the tenancy (about 5*s.* in the £ of a reduction in all cases where an advance of the full purchase price is sanctioned by the Land Commission)." According to the conditions the person offering the highest premium or fine for the tenancy in each lot was to be the purchaser, and each tenancy was to commence from the date when the purchaser became entitled to possession under the conditions of sale, and the rent was to be payable half-yearly

on specified days. The necessary forms of proposals for tenancies and the agreements to purchase under the Land Purchase Acts were to be drawn up by the solicitors having carriage, and to be subject to the approval of the Land Judge; and each purchaser was, immediately after the sale, to sign the proposal for tenancy and agreement to purchase in the form appended to the conditions of sale. Condition 6 provided:—"On payment of the balance of the purchase-money, each purchaser shall be entitled to possession of the lands comprised in the lot purchased by him as a Court tenant pending the matter, and will, if required, sign the usual form of proposal for such tenancy." Condition 7 provided:—"As soon as any purchaser shall become entitled to possession of the lands comprised in the lot purchased by him, he shall, when required, sign and execute a formal agreement to purchase the lands in fee-simple, under the Land Purchase Acts, and shall sign all documents which may be necessary for the purpose of carrying out the purchase. The said agreement shall provide for the payment of interest instead of rent at 4 per cent. from the date of the purchase agreement until the vesting of the fee-simple in the purchaser, and for the reservation of the minerals to the Land Commission, and of the sporting rights to the estate."

The memorandum appended to the conditions of sale to be signed by the purchaser of each lot or letting was as follows:—"He hereby proposes and agrees to become tenant from year to year under the Court, pending the matter, of the lands and premises comprised in the lot, upon the terms specified in the particulars and foregoing conditions; and he further agrees (in case his proposal is accepted by the Judge) to purchase the lands in fee-simple under the Land Purchase (Ireland) Acts, at the price, and in the manner, and subject to the terms, named and provided in the said particulars and conditions." A sale was duly held under the foregoing conditions, and seven lots of the untenanted lands were sold and fetched prices which the receiver considered satisfactory. Upon the proposals for tenancies, in accordance with the conditions of sale, being submitted to the Land Judge for acceptance, the lessors of the lease of 1851 opposed the application, and asked liberty to intervene in the matter, which they were permitted to do; and on February 17, 1905, the matter came on for argument.

Ross, J.
1905.

In re RYND'S ESTATE.

F. N. Greer, in support of the application:—

This is an application to the Court to accept certain proposals for tenancies, pending the matter upon the terms set out in the printed conditions. One of the conditions binds each tenant, when required to enter into an agreement to purchase his "holding," under the Land Act of 1903, at a price named in the particulars; but that agreement is to be subject to the approval of the Judge. Under the contract the buyer of each letting is given an option of purchasing under the Purchase Acts. There is a *bona fide* tenancy created, and there is nothing in the letter or spirit of the Purchase Acts to prevent the creation of *bona fide* tenancies with a view to a subsequent purchase. In *Pentland's Estate* (1) (which will be relied on by the other side) the facts were different, the question being as to redemption of part of a rent, and that case was decided in the year 1885. Since that date the scope of the Purchase Acts has been extended and enlarged.

In *Ryland's Estate* (2) the contract to purchase and the contract of tenancy took effect contemporaneously, and the tenant was never anything but a purchaser in possession.

In *Goodbody's Estate* (3) the contract of tenancy and the agreement to purchase were executed on the same day; the contract of tenancy was to determine, in case the sale was not carried through: no gale days were fixed; and Meredith, J., held that no genuine tenancy was created or intended to be created.

But under the conditions in the present case genuine Court tenancies are created; the rent and gale days are fixed; and if a sale should not be carried out, the tenancies would still continue.

This is an insolvent estate, and any letting made by the Court of portion of such an estate since the passing of the Land Act of 1896, is of necessity a letting made with a view to a sale under the Purchase Acts, since the Court tenant, by virtue of section 40 of the Act of 1896, at once acquires an interest in the sale of the estate. This arrangement merely anticipates the application of that section by fixing beforehand the prices to be paid for the respective tenancies in case of a sale; the proposed tenants

(1) 22 L. R. Ir. 649. (2) 27 Ir. L. T. R. 72. (3) 32 I. L. T. R. 87.

have agreed to these prices, and the receiver in his affidavit states that they are fair and proper. [He also cited *Egmont's Estate* (1).]

This is not against public policy, for we are merely doing by one act what could lawfully be done by two.

R. W. Lucas, for the lessors of the lease of 1851 :—

The Court has no jurisdiction to confirm these agreements. Sub-sect. 2 of section 40 of the Act of 1896 (as amended by section 7 of the Act of 1903) does not apply, because there is no person in "occupation," *i.e.* "in free use and enjoyment," of the lands, or "paying rent" therefor. Nor could the Judge make, in reality, "an offer to sell," or the Land Commission "an offer to purchase," because the buyers of these lettings have contracted to buy under the Purchase Acts at a price already fixed.

Under these conditions of sale there is an attempt to create holdings for the purpose of purchase, and such a purchase, if carried out, would be (in the words of Fitz Gibbon, L.J., in *Pentland's Estate* (2)) "a misuse of public money." See also the observations of Porter, M.R., in *Guy* v. *O'Hagan* (3), as to an attempt to create a sham tenancy for the purpose of selling through the Land Commission. No doubt there were considerations in that case which do not arise here, but the principle is the same.

There must be a rent-paying, occupying tenant to purchase. Section 8 of the Land Act of 1903 is the section that deals with the purchase of *untenanted* land by the Land Commission, and may be contrasted with the provisions as to purchase by occupying tenants of their holdings.

The transaction in this case is one between vendor and purchaser, and not between landlord and tenant, and it cannot stand. The letting is really a purchase. By the same stroke of the pen the buyer of a lot becomes a tenant to the Court and a purchaser of the fee. He is bound to purchase under the Purchase Acts, and it is said that he is only given an option to

(1) M'Carthy's Rep. 44. (2) 22 L. R. Ir. 649, at p. 655.
(3) Since reported—5 New Ir. Jur. Rep. 172.

Ross, J. 1905. *In re* Rynd's Estate.

purchase, and that the Court may refuse to sanction the letting. The contractual obligation is a curious one. It is a case of, "I am always bound and you are free." The buyer of a letting can have no option, for on coming in as tenant he is bound to purchase the fee-simple at twenty-three years' purchase.

For the purposes of the Purchase Acts, you must have a real tenant and a real tenancy. In this case the tenancies are to be created merely for the purpose of sale. It is an extraordinary proposition that any outsider can come in and be put in possession of the lands on signing these agreements, and become a purchaser under the Purchase Acts, when the policy of the Acts is to benefit tenants holding under contracts of tenancy. *Goodbody's Estate* (1) governs this case. *Ryland's Estate* (2) is to the same effect: *In re Pentland's Estate* (3).

The Court will not decide this case on the decision of Mr. M'Carthy in *Egmont's Estate* (4).

There is only one sub-tenancy existing in the lands demised by the lease of 1851, and the lessors of that lease are the landlords, who should sell to a purchaser and obtain the benefit of the *bonus*, in place of carving up these lands, which are their property (subject to the lease), for the sake of the creditors of an insolvent estate who are to reap the benefit of advances made under the Purchase Acts to persons intended to be planted on these untenanted lands for the purpose of sharing in the public money. Besides this, the lands demised to Rynd in 1851 are in fact a residential holding, with plantations and fox covers, situate in the heart of the hunting county of Kildare, and are not suitable for the creation of agricultural or pastoral tenancies. The lease contains covenants not to commit waste, and to keep in repair, which the lessors will enforce against any person introduced on the lands if he violate any one of them.

Feb. 21.

Ross, J.:—

The owner's estate, which is now vested in his assignees in bankruptcy, consisted of premises demised by a lease of

(1) 32 Ir. L. T. R. 87.
(2) 27 Ir. L. T. R. 72.
(3) 22 L. R. Ir. 649.
(4) M'Carthy's Rep. 44.

17th December, 1851, for a term of 170 years, at a rent of £214 18*s.* 11*d.* per annum. The lease provides that the lessee shall not, without the landlord's written consent, sub-let or sub-divide the lands in less portions than twenty-five acres. Up to the present the entire lands were in the receiver's hands, with the exception of one holding, which the tenant had agreed to buy under the Purchase Acts. The parties interested proposed to deal with the greater portion of the lands, consisting of 289 acres, in the following manner. The lands were divided into eight lots in suitable and convenient divisions. One lot consisted of the residence, garden, and out-offices, containing about 80 acres. Each of the other lots contained more than 25 acres. There was nothing to prevent the parties interested from letting the lands in the lots proposed to persons who would become ordinary Court tenants pending the matter at the rent contained in these proposals. Afterwards, when section 40 would be in due course applied, each of these tenants would be entitled to an offer to purchase the fee-simple, or, on waiving their rights under section 40, a sale might be concluded by agreement.

The course adopted by the parties was to hold an auction. What was offered for sale was a yearly tenancy pending the matter, subsequently to be created under the Court, together with the benefit of an agreement to be entered into for the purchase of the fee-simple of the tenancy under the Land Purchase Acts at a price of twenty-three years' purchase of the rent.

Now it is very likely that if the lands had been held in fee-simple the matter could have been worked out. In dealing with large estates, I am well aware this method has been resorted to—lands in hands have been portioned out in tenancies—with the very object of being bought by the tenants at prices agreed upon before the tenancies were created. Evicted tenants have been restored, and tenants' holdings have been enlarged. This estate is, however, not held in fee, but under lease, and subject to a substantial rent.

The owner of this rent challenges the whole transaction, and denies the right of the parties interested in the estate to redeem his superior interest.

He contends that this interest cannot be redeemed unless in

Ross, J. 1905. *In re* RYND'S ESTATE.

case of real existing tenants, and that none of these persons are intended to be tenants at all.

That brings me to consider the nature of the transaction. The particulars and conditions of sale are skilfully drawn: the ordinary form of proposal with no reference to sale must be signed. It states the rent, and mentions gale days, and provides for the taking out of a lease. The detailed particulars set out the yearly rent mentioned in the proposal, and also the annuity payable in case the advance of the full purchase price is sanctioned by the Land Commission. In the conditions of sale it is provided that the person offering the highest premium or fine for the tenancy comprised in each lot shall be the purchaser thereof. Each purchaser shall immediately after the sale sign the proposal for tenancy and agreement to purchase under the Land Purchase Acts in one form which is appended. As soon as the purchaser shall become entitled to the possession of the lands he shall, when required, sign and execute a formal agreement to purchase the said lands in fee-simple under the Land Purchase Acts at a fixed price. Interest at 4 per cent. is payable from the date of the purchase agreement, and it is also provided that the purchaser is to pay the difference in cash between the fixed price and the amount the Land Commission may be willing to advance. The most that can be said for the contention that there is a *bona fide* tenancy is this, that under condition 7 it might be conceivable that the purchaser might become liable for rent. It is, however, impossible to read the conditions and particulars without seeing that the proposed sale under the Purchase Acts is the aim of both parties, and that the proposed tenancy is a fiction. At the very time when the purchaser becomes tenant, he becomes in equity purchaser of the fee-simple. It has been contended that it is the general policy of the Acts, particularly of the Act of 1903, to turn tenants into owners, and to distribute untenanted land among peasant proprietors. No doubt there are cases where sales can be made to persons who are not occupying tenants, for the purpose of enlarging holdings, or in cases where untenanted land is purchased by the Estate Commissioners or Congested Districts Board. But except in these cases specially provided for, there is no power to sell under the Purchase Acts to a person who is

not a tenant. I must, therefore, hold that the contention of the owner of the superior interest is well founded, and I accordingly refuse to accept the proposals. I may add that since I arrived at this conclusion, I have read the full judgment of Mr. Justice Meredith in *Goodbody's Estate* (1). I altogether concur in the learned Judge's very luminous judgment, and am of opinion that in no essential respect does it differ from the case before me. While not blaming the parties in any way, I may add that if I had understood the real facts of the case, I should never have made the ruling of 12th December, 1904.

Ross, J.
1905.

In re RYND'S ESTATE.

Solicitors having carriage: *White & White.*
Solicitor for the lessors in the lease of 1851: *Tuthill.*

W. C. S.

IN THE MATTER OF THE ESTATE OF MAXWELL CLOSE (2).

Appeal.
1905.
April 28.
May 1, 2.
June 5.

Landlord and tenant—Land Purchase Acts—Redemption of superior interests—Date at which value is to be ascertained—Variable rent—Principles on which redemption price is to be fixed.

C. sold his estate to his tenants under the Land Purchase Acts. The estate was held under a perpetuity grant from Trinity College, Dublin, subject to a rent of £1836, variable in accordance with the provisions of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851. After payment of outgoings C. had, prior to the sale, a profit rent of £117, most of his tenants having fixed judicial rents of second statutory terms. The purchase-money of the estate was £52,423. On an application to fix the redemption price of the rent payable to Trinity College, Dublin, Meredith, J., had fixed the same at the sum of £45,000, on principles appearing in his judgment, already reported (*ante*, p. 207):—

Held, by the Court of Appeal, that the order of Meredith, J., should be affirmed.

The price to be paid for a superior interest on redemption is the amount which will enable the owner to purchase an investment equally secure, which

(1) 32 Ir. L. T. R. 87.

(2) Before LORD ASHBOURNE, C., PALLES, C.B., and WALKER and HOLMES, L.JJ.

Appeal. 1905. *In re* CLOSE'S ESTATE.

will produce an income equal to that of the superior interest, together with a small addition by reason of the redemption being compulsory. But in determining what is the nature of the security afforded by the superior interest the Court will not treat the income derived therefrom as a perpetual annuity charged upon the purchase-money, but will value the estate in the lands sold, of which the owner of the superior interest was possessed at the moment of the sale.

The special circumstance that Trinity College is bound to utilise the redemption price as an income-bearing fund should not influence the Court in ascertaining the money value of the rent.

There is no rule of law that the number of years' purchase to be paid for such a rent as that payable to the College, where a sale is within the zones, must be at least as many as the owner of the mesne interest received upon his net income upon the sale to his tenants.

Leader's Estate ([1904] 1 I. R. 368) explained.

APPEAL by Trinity College from the decision of Meredith, J., already reported, *ante*, p. 207, where the facts of the case are fully stated.

Ronan, K.C., and *Jellett, K.C.* (with them *G. W. Walker*), for the appellants.

Matheson, K.C., and *S. L. Brown, K.C.* (with them *Chaytor*), for the respondent.

June 5.

LORD ASHBOURNE, C.:—

This is an appeal from Mr. Justice Meredith, and is important as it involves the consideration of the principles upon which "superior interests" are to be valued, when their redemption is necessary under the Land Law (Ireland) Act, 1903.

The appeal practically challenges and seeks to re-open the decision of this Court in *Leader's Estate* (1). The law relating to the redemption of superior interests under the Irish Land Purchase Acts has been fully discussed in *Owen's Estate* (2), and the sections in the Acts of 1885, 1887, 1896, and 1903, relating thereto, have been fully opened and examined in the arguments addressed to us.

(1) [1904] 1 I. R. 368. (2) [1900] 1 I. R. 151.

The facts of the case are stated in the fullest and clearest way in the judgment of Mr. Justice Meredith, and I deem it only necessary to refer to such of them, and to such an extent, as may be necessary for the purpose of my judgment.

Mr. Close sold to his tenants his estate, which was held under a perpetuity grant from Trinity College, Dublin, subject to a rent of £1836, for £52,423. Under the provisions of the Trinity College Leasing and Perpetuity Act, 1851, this rent was variable every ten years, and in accordance with the scale of prices laid down in the Act; but at the time of the sale there was no present probability of a variation. After payment of outgoings, Mr. Close had only a profit rent of about £117 a year. The tenants' rents were practically second-term judicial rents when Mr. Close sold and applied to have the redemption price of the perpetuity rent fixed.

Mr. Justice Meredith, after evidence and argument, fixed the redemption price of the College rent "with all its advantages and infirmities" at £45,000. The soundness of his decision has been challenged in this appeal, and it is urged that he should have awarded at least the entire purchase-money of £52,423, and that even then Trinity College would have been a loser.

I do not think that it is quite the function of this Court to sit in judgment on the actual figure selected by the primary Court, and to balance on estimates of value and considerations of amounts, more or less, what particular figures might appear to be most satisfactory.

It is, I think, expedient for the appellants to show that the Court below has misapplied, or omitted to apply, legal principles, and has made mistakes in law or miscalculations as to facts or figures in making its valuation.

The appellants' counsel do not hesitate to insist that the decision of Mr. Justice Meredith is open to a series of legal objections, all of which were dealt with and considered by that learned Judge, and many of them repeated here with great power by Mr. Ronan and Mr. Jellett.

The two broadest contentions of the appellants were—(1) that Mr. Justice Meredith had misconceived the nature of the superior interest to be redeemed; and (2) that the decision in *Leader's*

Appeal. 1905.

In re Close's Estate.

Lord Ashbourne, C.

Estate (1) had been misinterpreted by Mr. Justice Meredith, or was itself erroneous.

As to the first of these two cardinal objections, Mr. Ronan insisted that Mr. Justice Meredith was radically and essentially wrong in treating the superior interest to be redeemed as the fee-farm rent issuing out of and charged on Mr. Close's estate at the time of the sale. He contended that the superior interest was a perpetual annuity of £1836 charged on £52,423; and he urged that at the governing dates the lands were discharged from the fee-farm rent, and the College claim had become one against the purchase-money alone. Mr. Ronan wanted to get rid of all the uncertainties and vicissitudes of value that a fee-farm rent charged on lands is liable to—the depreciation of the value of the lands, the possible lowering of the fee-farm rent, the lessening of the security, the narrow margin left after its payment. In other words, his contention amounted to a claim that the College fee-farm rent was to be valued after the sale on entirely different principles from those which attached to it before the sale—that it might be hampered and fettered by all the uncertainties and disadvantages of Irish Land tenure one day and freed from them the next. This argument would really alter the subject-matter to be redeemed. I cannot think this contention well-founded, as it is not so much the superior interest, as the claim which the owner of the superior interest had against the land in respect of that interest, which is transferred to the purchase-money. Mr. Ronan rightly pressed this contention with much insistence; and if he had succeeded in it, the figure to be awarded as the value on redemption might have been substantially affected.

The argument as to the application and meaning of the decision in *Leader's Estate* (1) took several forms.

It was the decision of this Court, and at all events bound the members who joined in the decision. The way the decision was approached before us was, by the statement that the Judges who decided it could not have intended to interfere with the law of compensation for the compulsory purchase of property; that the closing part of the order in *Leader's Estate* (1) was inconsistent

(1) [1904] 1 I. R. 368.

with the earlier part; that it went too far; and that Mr. Justice Meredith had given those closing words too absolute a meaning, and that he did not sufficiently recognise the owner's right to be indemnified against loss.

What was the order in *Leader's Estate* (1)? The order was in the following terms:—"Declare that the redemption price of the rent ought to be fixed at the price or sum which appears upon due consideration of all the circumstances of the case—of the selling prices of similar interests, of the value of money, and of the fact that the redemption is compulsory—to be the fair value thereof; but that the amount of the said price ought not to be affected by the consideration of indemnifying the owner of the said rent against loss of income by reason of the difference between the annual amount of the said rent and the annual income of any investment or class of investments in which the redemption money might be invested."

It was urged on behalf of the appellants that the latter portion of the order was inconsistent with its earlier portion as well as with the existing law, and that it misled Mr. Justice Meredith. But the order was framed to meet the case before the Court of Appeal, and the grounds upon which Mr. Justice Ross had based his decision. This Court, from the report of the case in the Land Court, had reason to believe that Mr. Justice Ross had held that the price ought to be adjusted at the sum which if invested in gilt-edged securities would produce an income equal to the rent-charge redeemed, although its true value might be below the value of such securities. Possibly the terms of the order in *Leader's Estate* (1) are not sufficiently precise or guarded on this subject, although indeed it is manifest from the closing words of the order that the Court was dealing with particular investments or classes of investments. I cannot find that Mr. Justice Meredith imputed to the order in *Leader's Estate* (1) any other meaning than that which I have indicated. At the close of his judgment he says: "I asked Mr. Jellett what he meant by his sixteenth proposition. He answered, as I expected he would, that his clients should be awarded such a sum of money as invested at 3½ per cent. would

(1) [1904] 1 I. R. 368.

Appeal. 1905.

In re Close's Estate.

Lord Ashbourne, C.

produce the £1836." This was like the old demand for gilt-edged securities, and Mr. Justice Meredith says he at once pointed out that this would exhaust the whole purchase-money, and be inconsistent with the decision in *Leader's Estate* (1).

Mr. Ronan pressed with great force that Mr. Justice Meredith should have increased his award in consequence of the high and important duties which had to be fulfilled by the College, and which required a stable and constant income. All must admit the importance of the duties; but I do not see that any increase could be made to the redemption money on this account. The intrinsic value of an annuity cannot be affected by the duties, the responsibilities, the obligations, the conscience of the owner. The personal position, the public, family, or private needs of the owner can never, I think, justify any variation in the measure of value to be applied. No case can be cited to support the opposite contention.

The appellants' counsel argued that the award to them should be of a sum that would enable the procurement of an equal income equally well secured. Speaking generally, that appears reasonable; but applying the proposition to this case, it must in the first place be realized what was the rentcharge, what was the value of its security, and what is the obvious significance of the words, "equally well secured." I have already pointed out that it was a rentcharge on lands subject to all the vicissitudes of such a security at the present day, and the obtaining of an equivalent income, equally well secured, would have to be worked out by skilful investments carefully selected by competent advisers, but not with first-class investments. It may be admitted that there might be some loss of income to be made good out of the College indemnity grant; and sect. 39 (2) recognises the possibility, or rather the probability, that the redemption money might produce a smaller income than was received before any redemption had taken place. If the question was put to any ordinary prudent man of business which he would prefer, the £1836 as it was charged on the Close estate, or the £45,000 measured as its value, I apprehend that many would be disposed to say the latter.

(1) [1904] 1 I. R. 368.

It might, of course, be that in the case of some fee-farm rents they would be charged on lands of such value, and with such a wide margin, that a price should be fixed which if invested in the best securities would yield an income equal to the old rent, and thus afford an equal income equally well secured.

Mr. Justice Meredith has embodied his opinions and conclusions in a long and able judgment. He has expressly and in terms stated that he had present to his mind and considered all the legal principles and elements which, on the authorities, he was bound to pass in review. He had not the aid of knowing the market value; but he had regard to all the circumstances of the case. He has examined and weighed the decisions in *Leader's Estate* (1) and *Kemmis' Estate* (2). I cannot see that he has omitted any legal direction he was bound to consider. He has exercised his judgment upon them. He has applied his discretion according to law; and after argument and evidence, in the exercise of his judicial discretion, he has measured the value of this rentcharge at £45,000. It is not for me, I think, to discuss or cavil at the actual figure selected. I can see no legal or other infirmity in his decision. His discretion has been exercised according to law and after due consideration of the facts, and, therefore, I think, his order should be affirmed, and this appeal dismissed with costs.

PALLES, C. B.:—

Mr. Ronan has based his argument in support of the appeal upon four propositions, and he has pressed the Court to state its opinion definitely upon each of them. As the purchase price of the "superior interest" of the appellants cannot be determined without a consideration of each of those propositions, I shall state my opinion upon each of them, so far as they are applicable to the case before us.

The first of these propositions is this—

(1) That, notwithstanding the decision of this Court in *Leader's Estate* (1), the purchase price to be paid for a "superior interest" is that which will enable the owner to purchase an investment

(1) [1904] 1 I. R. 368. (2) *Ibid.* 496, 500.

Appeal. 1905. *In re* Close's Estate. Palles, C.B.

equally secure, which will produce an income equal to that of the "superior interest," together with a small addition by reason of the purchase being compulsory. He has asked that if we are of opinion that the decision in *Leader's Estate* (1) prevents us adopting this principle, we should reconsider and overrule it.

(2) His second proposition is that, in determining whether the investment is equally secure, we must assume that an income equal to that produced by the "superior interest" is now charged upon the purchase-money in Court; and that that which is to be valued is, a perpetual annuity of that amount, charged, not on the lands which have been sold, but on the purchase-money which those lands produced.

(3) Thirdly, he contends that in ascertaining the amount in the present case, we are bound to take into consideration the special position of Trinity College, which he says is bound to invest in trust securities the sum it may receive as the value of the "superior interest."

(4) He insists that, as a matter of law, the number of years' purchase to be paid for the "superior interest" must be at least as many as the owner of the lease, upon the sale to his tenants, received upon his net income.

(1) As to Mr. Ronan's application that we should reconsider the decision in *Leader's Estate* (1), I should have been of opinion, were it necessary to do so, that the procedure in *Ladd* v. *O'Toole* (2) should be adopted, and that the full Court should be summoned for that purpose. But I conceive that that course is not necessary, as I hold that, on the true construction of the order there, it does not declare anything contrary to the first of Mr. Ronan's propositions. There may be some expressions in the judgments which, by reason of their generality, may be capable of mis-interpretation; but they, as those of every judgment, must be construed *secundum subjectam materiam*. Further, we know from each of the Judges who were parties to that decision, two of whom are members of the present Court, that they did not intend to lay down in that case anything beyond that embodied in the order, construed as I construe it.

(1) [1904] 1 I. R. 368. (2) [1904] 2 I. R. 389.

That order commences by declaring—

> "That the redemption-price of the rent ought to be fixed at the price or sum which appears, upon the consideration of *all* the circumstances of the case, of the selling prices of similar interests, of the value of money, and of the fact that the redemption is compulsory, to be the fair value thereof."

So much of the order has not been subjected to criticism, and is admitted to be correct. Then it proceeds:—

> "But that the amount of the said price ought not to be affected by the consideration of indemnifying the owner of the said rent against loss of income by reason of the difference between the annual amount of the said rent and the annual income of any investment, or class of investments, in which the redemption-money *might be invested.*"

The argument is rested upon the concluding words, "might be invested." It does not appear from the report whether the "superior interest" there was or was not the subject of a settlement, but the case was argued as if it were; and I think that those words relate to such investments as were the subject of consideration there, *i.e.* trust securities. The decision is that the purchase price need not *necessarily* be such a sum as, if invested in *trust securities*, will produce an annual return equal to the previous income; and undoubtedly that decision is correct, as otherwise, were the security of the income of the "superior interest" less stable and satisfactory than that of trust securities, its owner, by reason of the redemption, would acquire the value of a better security than he previously had for his income.

Much of the argument turned upon a report of the discussion before the Land Judge. "From that report," says FitzGibbon, L.J., "it would appear that the counsel on one side submitted that, having regard to the price that could be had for money *in trust securities* at the present time, the demand for thirty years' purchase was unreasonable. This was met by counsel for the owners of the rent, by stating that, at thirty years' purchase, they would be losers of 10 per cent. on their income, which was fully secured at present. The Land Judge is reported to have said that he had consulted high financial authorities, and that the highest rate of interest he could get for £100 invested on

Appeal. 1905. *In re* CLOSE'S ESTATE. Palles, C.B.

trust securities was £3 8*s.* 6*d.*; that twenty-nine years' purchase would bring the full amount of the rent, if invested in securities at that rate, which he found could be got."

Later on, the Lord Justice refers to a discrepancy between the estimate of the Land Judge in that case and that of the Land Commission in another case, which he considered challenged inquiry, and which he thought might be explained "by the introduction, into the factors of the Land Judge's result, of the element of reduction of income arising from the difference between the amount of the rent and the annual income derivable from the *class of securities* upon which he assumed that the redemption price *would be invested.*"

These references show that the contention there was that the supposed investments, of which the cost was to be the measure of the redemption price, and which should produce an income equal to that of the "superior interest," should be trust investments. The order negatives this contention; it does not negative Mr. Ronan's proposition that they should be "equally secure with that of the superior interest." Indeed, this very thing appears to have been in the mind of FitzGibbon, L.J., as at the commencement of his judgment he states that "the process" of fixing the redemption price, and its "result, ought to be similar to what would occur in the case of a compulsory purchase of like property under the Lands Clauses Acts or the Railway Acts."

I may remark that one of the matters which the order specifically directs to be taken into consideration is "*the value of money*," which may include the value of marketable securities. Being of opinion that this decision does not interpose any obstacle to our determining the question, I have no hesitation in stating my opinion that the principle of valuation to be adopted in all cases of compulsory purchase should be uniform, unless a special intention to the contrary is apparent from the Act imposing the obligation to sell, and that as no such special intention is shown by either the Lands Clauses Acts or our Land Purchase Acts, the principle of valuation under the latter should be identical with that which has been well established under the former. The foundation of that principle was not any peculiar words in the Lands Clauses Acts. That which was to be ascertained, under them, was, as is pointed

out by the Earl of Halsbury, L.C., in *The Inland Revenue Commissioners* v. *Glasgow and South-Western Railway* (1), "the *value* of the lands so to be purchased." Here, as there, the expropriated owner is to receive the *value* of that of which he has been deprived; and the principle of valuation is that which is mentioned by FitzGibbon, L.J., in *Leader's Estate* (2) as applicable there; that which I understand to be that insisted upon by Mr. Ronan, that the price is to be the purchase-money of an *equally secure investment* which would produce an annual *return* to the owner *equal to his previous income*; this purchase-money to be increased by a small addition by reason of the purchase being compulsory. Were the thing in question such that something practically identical with it could be obtained at a money price—in other words, were it something for which there was an open market—the *value* would be the price at which that identical thing could be obtained in the market. When, as is admitted to be the case here, there is no market for the particular thing, but that thing consists of money, *viz.* a rent or an annuity, the price must be that of a thing similar in all material respects, *i.e.* similar in amount, and similar in security.

I am not aware that this principle has ever been deliberately departed from, although the number of years' income at which the price has been fixed may possibly in some cases have been erroneous.

For this reason, I do not think it necessary to discuss the various cases cited by Mr. Ronan. I did not hear any answer attempted to his argument on this, the first question, save that the contrary was decided in *Leader's Estate* (2)—an answer which, for the reasons already stated, I decline to adopt.

(2) As to Mr. Ronan's second proposition, I cannot concur in it. In my opinion the subject-matter to be valued is "the superior interest," that is, the estate in the land sold of which the appellants were seised at the moment of the sale; not a perpetual annuity *payable out of the purchase-money* lodged in Court of an amount equal to the appellants' previous income. It is true that, when the order under section 24 of the Act of 1903 was

(1) 12 A. C. 315. (2) [1901] 1 I. R. 368.

Appeal. 1905. *In re* CLOSE'S ESTATE. Palles, C.B.

made, that section, and section 9, sub-sect. 5, of the Act of 1885, transferred to the purchase-money the claim of the appellants which, previously to the sale, had affected the lands afterwards sold; and it is also true that that order was made after the sale. But the subject-matter of the appellants' claim was, in my opinion, not at that time a subsisting rent payable *de anno in annum*, but was the capital sum constituting the redemption price of that rent. The power to redeem, vested in the Land Commission, ripened, at latest at the moment of the sale, into an obligation to redeem; and the right of the owners of the "superior interest" at that moment changed from their previous right to an annual rent to a right to a capital sum. Section 24, sub-section 4, of the Act of 1903 is limited to *terminable* charges; and the power created by sub-section 5 of the same section to pay the "annual income of his claim," would not, in the present case, authorise payment of anything more than the interest on the purchase price. The head-rent ceased to exist on the sale. Besides, the operation of that sub-section was intended to be temporary only. Its operation cannot continue after the distribution of the purchase-money; and sub-sect. 6 directs that that distribution shall take place *as soon as practicable* after the sale. Further, the exercise of the discretionary power of the Commissioners cannot alter the rights of the parties.

To test the accuracy of this reasoning, let an attempt be made to apply Mr. Ronan's argument to a case in which the superior interest consists of mines or minerals, or of a right of sporting—cases which do not differ, in principle, from the present. This attempt must necessarily fail. The right of the owner of such a superior interest cannot be determined, save upon the assumption that the conversion of the rights which I have mentioned has actually taken place—an assumption which, if it is to be made in one case, must be made in all.

The object of the provisions of the Act of 1903, under which the sale of the estate takes place before the ascertainment of the redemption price, is merely for more effectually carrying out the policy of the Act of vesting the fee-simple in the tenants at the earliest moment, and cannot affect the principle upon which the appellants' claim is to be valued. But for the Act of 1903, and

the proceedings in this matter, the appellants' right would have been to the fee-simple of the land, subject to the lease vested in Major Close. What is to be valued is that fee-simple estate, subject to that lease.

(3) As to the third proposition, whether the special circumstance that Trinity College must, or probably will, utilise the redemption price, when paid to them, as an income-bearing fund, ought to affect the money value of their interest, I entirely concur in the judgment of Meredith, J., and I adopt his reasons. To them I shall only add, that that which is to be valued is the "superior interest" in the land; and that although the value of the land may be affected by certain personal acts of the owner, as, for instance, by his carrying on therein a particular trade, such personal acts only can be taken into consideration as actually affect the land for which the price is to be a compensation. Here the personality of Trinity College, its powers and its obligations, do not affect the land. They may affect the use of the purchase-money; they cannot alter that of the land. If authority were required, it would be found in the opinions of the Lord Chancellor and of Lord Watson in *The Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Company* (1), already referred to.

(4) The fourth proposition is, in strictness, not applicable to the present case, as here the income of the "superior interest" is, by virtue of the Trinity College Act, 1851, subject to a variation which need not necessarily in the same degree affect the income of the entire estate. As this difference, however, is capable of valuation and adjustment, I leave it out of consideration, and, for the purpose of the question, assume the College interest to be a perpetual, invariable rent, adjusted in amount in such a way that its principal value shall be equal to the principal value of the variable rent here.

The question, then, is whether the ratio which the purchase price of the "superior interest" bears to the annual income of that interest, in a case such as the present, *must be* at least the ratio which the purchase price of the entire estate bears to the income of that estate.

(1) 12 A C. 315.

Appeal. 1905. *In re* Close's Estate. Palles, C.B.

In considering this question, it must be borne in mind that, admittedly, the purchase price of the entire estate must be taken into consideration as an *element*. Upon this subject, I agree in, and adopt, all that has been said by Meredith, J.; and I do not, nor did he, suggest any limit to the extent to which this price may, and ought to, affect that of the "superior interest." I can understand many cases in which it ought to so dominate every other consideration, that a conclusion of fact, to the effect contended for by Mr. Ronan, ought to be arrived at. But Mr. Ronan's contention goes further. He is not satisfied that, in a particular case, this may be so; he insists that, in every case, it must be so—that the result ensues, not from considerations of fact applicable to a particular case, but from those of law which apply to every case. Meredith, J., was of opinion that the proposition thus put could not be sustained, and I agree with him. To entitle the owner of the "superior interest" to a proportion of the purchase-money of the entire, calculated on the basis of the respective annual incomes, it must be shown that the ascertainment of the purchase-money of each either is to be upon the same principle, or that the owner of the "superior interest" is entitled to the benefit of the contract for sale of the entire estate.

This brings me to the distinction between cases within the 1st sub-section of section 1 of the Act of 1903, and those within the 2nd sub-section. In the latter, those within the 2nd sub-section, it is a condition precedent to the sanction by the Estates Commissioners of the advance, that they shall be "satisfied with the security," and "consider the agreed price to be equitable, having regard to the interests of" "all persons interested in the estate." This class of persons includes both the owner of the "superior interest" and the middleman; and thus, when in such a case the sale is sanctioned, the agreed price must be taken to be equitable, as between those parties. On that assumption I should think that the value of the "superior interest" per pound sterling of income receivable could not, in a case such as the present, be less than that of the value per pound sterling of the net income receivable by the middleman; and, consequently, I should be inclined to hold that, in relation to such an estate, Mr. Ronan's proposition would be true.

The present, however, is not that case. Part of this estate is what is popularly said to be "within the zones"; or, to speak more technically, within sect. 1, sub-sect. 1. It follows that the purchase price of £52,423 has not been found by the Estates Commissioners to be an equitable one, because in the case of holdings within sub-sect. 1, they have no jurisdiction to investigate the price. Does this circumstance enable us to say that the purchase price of the entire estate *may* have been ascertained upon principles different from those which we are bound to apply to the determination of the redemption price of the "superior interest"? I am of opinion that it does. The Act deals differently with the immediate landlords of tenants in actual occupation on the one hand, and the owners of "superior interests" on the other. As against the latter class, it has established, whilst in favour of the former class it has refused to establish, compulsory purchase. Therefore, the mesne landlord may, in his negotiations with his tenants, by refusing to sell on other terms, succeed in obtaining a price higher than that which would be deemed equitable by the Estates Commissioners, and this to a considerable extent—to the extent to which, *consistently with sect.* 1, *sub-sect.* 1, *of the Act*, a tenant may be willing to pay a price above the fair value, in order to obtain the benefits which it is considered the Act confers upon a purchasing tenant.

This drives me to consider to what extent is this enhancement of price, above the fair value, in the purchase of holdings "within the zones," *i.e.* within sect. 1, sub-sect. 1, consistent with that sub-section? In such cases, if the rent has been fixed since the passing of the Act of 1896 (*i.e.* if the case be within clause (*a*) of sub-sect. 1), the purchase prices may vary within two limits. The superior limit is the sum in respect of which the purchase annuity is only ten per cent. below the existing rent. Thus, if the existing rent be, say, £100 a year, it would be such a price as would be paid off by an annuity, for the term mentioned in the Act, of £90 a year. But, on the other hand, the purchase annuity, although the case be within the same sub-section, may be as low as 30 per cent. below the existing rent, *i.e.* in the case put, £70 a year; and the purchase-money will be the sum which will be paid off by it. This is the inferior limit of price. In other words,

Appeal. 1905. *In re* Close's Estate. Palles, C.B.

the price, in cases within sect. 1, sub-sect. 1 (*a*), may vary in the proportion of 20 (being the difference between 30 and 10) to 90, *i.e.* may vary 22·2 per cent. Therefore, there may be two contracts for purchase of parcels of land, in all respects similar in extent, character, value, and other circumstances, the contract price of one of which is £1000, and of the other a sum of over £1200. Both of these prices cannot be equitable, but both contracts must be sanctioned by the Estates Commissioners. The same argument can be applied to cases within sect. 1, sub-sect. 1 (*b*), with this exception only that in such cases the maximum and minimum prices would be to each other in the proportion of 80 to 60—a variation of 25 per cent.

The principle, then, applicable to fixing the price upon a sale by a mesne owner is such that in a particular case he *may* secure upwards of 20 per cent. and in another 25 per cent. above the equitable value; whilst in a third case his circumstances may coerce him to sell at a similar percentage below the equitable value. Upon the other hand, the owner of the superior interest, from whom the right of bargaining has been taken away, whilst he is secured the real value of his interest, cannot receive any increase above that real value other than the small sum incident to the purchase being compulsory. At all events, therefore, the purchase-money of the entire estate, and that of the superior estate, *may*, in the present case, have been calculated on different principles; and I cannot find anything in the Act which necessarily entitles the owner of a "superior interest" to a proportion of the excess above the equitable price which the mesne owner may have thought proper to insist upon receiving from his tenant. I cannot see anything which would prevent a mesne owner from saying to his tenant, "The expenses of the sale, including the solicitor's costs, the commission of the negotiator, and the payment to the land agent contemplated by the Act, will amount to a certain percentage upon the purchase-money; and I will not sell unless that percentage is added to what, under other circumstances, might be the fair price." In such a case, before a proportion were attempted to be arrived at between the sums to be attributed to the superior and mesne interests respectively, this percentage should be deducted. I do not go into the amount of

the deductions. Mr. Ronan's argument is answered by showing that the prices are not proportionate. The extent of the disproportion is immaterial.

So far I have done no more than express my opinion on Mr. Ronan's propositions. To come now from general propositions to the case before us, I cannot find any principle, explicitly laid down by Meredith, J., which differs from those which I hold to be true ones; but before I came to consider the figures accurately, I confess that I entertained some doubt whether some of the expressions in the judgments in *Leader's Estate* (1) did not lead him to an erroneous interpretation of that decision. Since I have considered the figures, I am rather inclined to think that is not so; but I am not certain. Mr. Brown, in his argument before him, contended, as he has continued to contend before us, that *Leader's Estate* (1) excluded as improper for consideration in any way the element of indemnifying the owner from loss of income. I have already stated that, with the advantage derived from two members of the present Court having been parties to that decision, I know that it did not decide, and was not intended to decide, that proposition. But I am not certain that Meredith, J., did not, to some extent, yield to Mr. Brown's argument; nor am I clear that had I been in his position I, too, should not have done so. One of the propositions submitted to Mr. Justice Meredith by Mr. Jellett was clear in its words, and, as I think, would have been well founded in law had the words "at least" been omitted, viz.:—

> "That, in all cases where a rentcharge or similar property is taken, a material element in estimating the loss to the vendor, and therefore the amount of the compensation, is the cost to him of acquiring an equal income *at least* equally well secured."

In my opinion, Meredith, J., might well have accepted that proposition, excluding these words "at least," and have based his judgment upon it. But how does he deal with it? "I asked" (he says) "Mr. Jellett what he meant by the 16th problem? He answered, as I expected he would, fairly and openly, 'that his clients should be awarded such a sum of money as, invested at 3½ per cent., would produce the £1836.'"

(1) [1904] 1 I. R. 368.

Appeal. 1905. *In re* CLOSE'S ESTATE. Palles, C.B.

And he, properly, rejects the proposition, as so interpreted. But he adds, further:—"But, particularly in reference to that requisition of Mr. Jellett, I desire to emphasize and repeat the argument of Mr. Brown, in his reply in this case, namely, that the order in *Leader's Estate* (1) is in two parts—one affirmative, and the other negative"; and having read the latter, the negative portion, he proceeds:—"Now, language could not be clearer than that, and if Mr. Jellett's sixteenth requisition is a requisition conflicting with that, it is impossible that I should accede to it, or take it into consideration. If Mr. Jellett says, 'What I mean by that requisition is that you are to take into consideration the value of money,' then I say I have already done that; I have taken into consideration the value of money in fixing this price, and no more remains to be said."

Upon the whole, I was unable at the close of the argument, and still am unable, to free myself of at least an uncertainty whether the order in *Leader's Estate* (1) had not been misinterpreted; and therefore I was, and am, coerced to the conclusion that we ought either to send back the case to Mr. Justice Meredith, with our authoritative interpretation of that decision, or that we ought now to fix the price ourselves. Of those two alternatives, I think, under all the circumstances, the latter is the preferable one; and here a strange matter occurs, which shows the extent to which Mr. Justice Meredith gave effect, in point of fact, although possibly not in law, to the application of Mr. Ronan's first proposition.

I have, to the best of my ability, calculated the purchase price, estimated upon the principles which I have stated. The rent is a variable one. I believe there was a probability that, if it had not been redeemed, the circumstances under which the right to vary it accrues would have existed at the next decennial period, ten years hence, and possibly at future recurring decennial periods. I have estimated, to the best of my ability, the money value of that probability. In doing this I have taken into consideration the difference which a comparison of clauses (*a*) and (*b*) of subsect. 1 of sect. 1 of the Act of 1903, shows that the Legislature

(1) [1904] 1 I. R. 368.

were of opinion existed between the average rates of fair rents fixed before and after 1896, or, roughly speaking, of first and second term fair rents, resulting, as it must have, from a difference in prices. I have considered the extent to which, if at all, the cause which produced that result continues, and is likely to continue, in the future. I have also considered the character of the security which the estate would have been for the payment of this variable rent if the sale had not taken place. This security was, to my mind, an eminently precarious one, and I have tried to ascertain the market price of investments which I believe to be similar in point of security. I have not left out of consideration what has been pressed upon us by Mr. Ronan, that if the estate had not been sold, and if, at some future time, it would have become—as I believe it would—insufficient to pay the Trinity College rent, even as reduced on variation, the College would have been entitled to evict the mesne lease. This is true; but as to Mr. Ronan's further argument, that in that event the College (who would thus have become the immediate landlords of the tenants in occupation) might have sold to them under the Act of 1903, with the additional advantage of obtaining the bonus, I have to say that it is by no means certain that at the time of such possible eviction, any bonus would be procurable. A time will come when the twelve millions provided by Parliament by way of bonus will be exhausted, and that time will probably be before that at which, had this interest not been redeemed, the lease would have been evicted. However, I have taken that matter into calculation. But, giving due weight to every consideration which I think ought to influence me, I have been unable to bring up the purchase-money to any sum above that fixed by Meredith, J., £45,000, which, upon the whole, I consider is a liberal purchase price.

In result, then, I concur in every part of Mr. Justice Meredith's able judgment, save so much of it as possibly may be taken to interpret the decision in *Leader's Estate* (1), and I am, consequently, of opinion that the appeal should be dismissed.

(1) [1904] 1 I. R. 368.

Appeal. 1905.

In re CLOSE'S ESTATE.

WALKER, L.J. :—

The question which we have to decide is whether Mr. Justice Meredith, in ascertaining, under section 64 of the Act of 1903, the redemption price of the superior interest—the head-rent payable to Trinity College—has proceeded upon any wrong principle of law, so that we are bound to remit the case to him to reconsider the price, with a declaration stating the right principle. It is, of course, open to us ourselves to fix the price upon the principle which we consider right. If I omit to notice several of the grounds of appeal formulated by the counsel for the College, it is because I consider them sufficiently dealt with in the elaborate and careful judgment which we are unanimously affirming. Mr. Ronan placed in the forefront of his argument one contention which he considered vital for his case, and which, no doubt, would have gone far to sustain it, namely, that in estimating the price or value of this superior interest, we had nothing to do with this £1836 per annum in its character of a charge or lien on the land—that the land had ceased to exist, and that land and rent were now represented simply by sums of money, and that what was to be valued was a perpetual annuity of £1836 payable out of a sum of £52,000.

In my opinion that contention is not sustainable. It is true that for the purpose of facilitating sales and giving an early title to the tenant purchaser, the land is transferred to him almost at once, and the purchase-money left to represent the vendor's interest and all claims upon that interest; but this in no way alters the character of the claims transferred to the purchase-money, or the mode of their redemption or discharge. This appears clearly from section 31 of the Act of 1896, "such superior interests, or the value thereof, shall become a lien upon, and be redeemed or satisfied out of, the purchase-money of such land," and in section 33 the purchase-money is treated for redemption purposes as if it were the holding. Section 24, sub-section 6, of the Act of 1903 makes similar provisions.

It is clear, therefore, that in ascertaining the value of this superior interest its security upon the land, and the nature of the security, must be taken into account. The £1836 per annum was a variable figure, and it is obvious to my mind it either would be reduced in the next decade, or might be, and, therefore, to treat

it as a fixed perpetual annual sum, would be unjust to those interested in the purchase-money.

It was also contended that the price of the superior interest should bear a ratio to the purchase-money received for the entire estate. It is not disputed that the amount of the purchase-money is an element to be taken into account, and Mr. Justice Meredith has taken it into account, but it cannot, as a matter of law, govern the price, at all events in a case like the present, where the estate practically comes within the zones, and the Estates Commissioners have no jurisdiction to inquire whether the price of the estate is an equitable one, and the owner may receive a price higher than what the Estates Commissioners would deem equitable, but the owner of the superior interest can only receive its real value with some addition by reason of the purchase being compulsory.

I think Mr. Justice Meredith has satisfactorily shown that there is no ground for another contention of Mr. Ronan, viz. the position of Trinity College and its alleged obligation to apply the redemption money as an income-bearing fund. Those considerations affect the use of the money only, not the value of the property to be assessed, and are not peculiar to the position of Trinity College.

None of us, I believe, are disposed to question the proposition advanced by Mr. Ronan that the owner of a superior interest is entitled to a price which will enable him to purchase an investment equally secure, which will produce an income equal to that of the superior interest with some addition by reason of the purchase being compulsory.

I leave out the words "at least" from the proposition, which tend to obscure it.

There is no doubt that counsel for the owner insisted that the decision in *Leader's Estate* (1) was contrary to Mr. Ronan's proposition, and the negative part of the order affords colour for that. I have myself no doubt that the decision in *Leader's Estate* (1) was pointed to the special contention before Judge Ross, and the trust securities dealt with there.

(1) [1904] 1 I. R. 368.

Appeal. 1905.

In re Close's Estate.

Walker, L.J.

But counsel for the owner contended for a wider application of the negative part of the order, and Mr. Justice Meredith himself refers to that negative part as important for his decision, and I think it is very doubtful whether he (most naturally under the circumstances) did not understand *Leader's Estate* (1) in the sense presented by Mr. Brown; whether he applied it so is another matter. The learned Judge has fixed a purchase price of £45,000, and for the purpose of his estimate he tells us that he has taken into account every circumstance. The value of money—the security of this £1836 rent—the fact that the purchase is compulsory—the selling price which the owner obtained—the possible though improbable contingency of the College evicting for non-payment of rent—an event not necessarily enhancing the value—and, speaking for myself, taking into account those circumstances and others to which he refers, I come to the conclusion, independently of *Leader's Estate* (1), and as a conclusion of my own, that he has fixed an extremely liberal price, and one which we cannot interfere with on any legal ground. It would take much to persuade me that this sum of £45,000 in the hands of Trinity College is not a more valuable asset than the £1836 rent which it takes the place of.

Holmes, L.J.:—

The superior interest, the redemption price of which is fixed by the order appealed from, is a fee-farm rent of £1836 payable to Trinity College, and charged upon an estate sold in this matter to the tenants for the sum of £52,423. Although it was decided in *Re Kemmis' Estate* (2) that an appeal lies to this Court from an order of the Judicial Commissioners fixing the redemption price of a superior interest, I am of opinion that, as a rule, we ought not to interfere where there is no legal principle involved, and the only question is one of amount. There may occasionally be a case where the result arrived at can only be accounted for by a mistake in calculation or by some element of value having been overlooked. It would then be our duty to correct the error; but in the absence of special circumstances, I would hesitate to overrule

(1) [1904] 1 I. R. 368. (2) *Ibid.* 496, 500.

the judgment of the Judicial Commissioner with his great experience of price and value, merely because I might have been disposed, had I been in his place, to fix the amount at a somewhat larger or smaller sum.

Counsel for the College, recognising that this Court would probably take this view of its duty, submitted to Mr. Justice Meredith certain propositions which they asked him to adopt and which they believed were material considerations in ascertaining the value of the head-rent. The Judge while accepting some of these propositions, rejected others; and the arguments in this Court have turned upon whether, in doing so, he excluded matters which ought to have influenced his judgment. The first of them, in importance, as well as in logical order, is the distinction which Mr. Ronan seeks to draw between a fee-farm rent charged on lands, and a perpetual annuity of equal amount charged on the money into which the lands have been converted. The object and effect of the distinction may not be apparent at first sight. If the purchase-money is to be taken as the true value of the lands, it may be thought that the capital value of an annual sum charged thereon would not be materially affected by transferring such charge from the lands to their equivalent in cash. But the energy with which Mr. Ronan pressed the proposition that in estimating the value of the head-rent the purchase-money, as distinguished from the lands, must be taken as the security therefor, shows the importance he attaches to it; and I agree with him that the result of accepting it would be to increase considerably the redemption price of the College rent. The cause of this is the fluctuation and insecurity of incomes derived from real property in Ireland. These elements of uncertainty had always affected the value of every interest in Irish lands. Even when times seemed prosperous, when rents were rising and there was no want of purchasers, prices never reached the level attained in England and other countries. In the days when the head-rent with which we are dealing in this case was secured by an annual rental of over £3000, and when rents and lands offered for sale in Ireland were eagerly bid for, I doubt if this rent could have been sold for more than twenty-five years' purchase.

These facts are as familiar to the learned counsel who repre-

Appeal. 1905. *In re* CLOSE'S ESTATE. Holmes, L.J.

sent the College as to me; and thence arises their anxiety to have it declared that the superior interest to be redeemed is a perpetual annuity charged on a fund in Court, invested in consols or in other similar securities. I quite agree that if they are right in this, the whole of the purchase-money would fall short of an adequate redemption price.

Having thus seen the consequences of the proposition, I proceed to consider the arguments in support of it. It cannot be denied that up to the sale to the tenants, the interest of Trinity College in the lands was a fee-farm rent charged thereon; and if the property had been taken compulsorily under the provisions of the Lands Clauses Acts, the compensation payable would be the value of this interest. The provisions of the Irish Land Purchase Code that relate to the redemption of superior interests have been exhaustively examined in *Owen's Estate* (1), and for my present purpose it is unnecessary to go farther back than section 16 of the Act of 1887. It is thereby enacted that when any land sold under the Land Purchase Acts is subject with other land to an annuity or rentcharge, the Land Commission may, if they think it expedient, by order apportion the same as between such land and the other lands subject thereto, and that if such apportionment is made, the part of the annuity, rentcharge or rent, which is apportioned on the land sold, shall cease to be a charge thereon, and shall be transferred to the purchase-money thereof. It is further provided that the Land Commission may, on the application of a person interested, or if they think it expedient without such application, order the redemption of such annuity, rentcharge or rent, or of an apportioned part thereof, at a price to be fixed in the manner prescribed in the section. It is to be observed that by this provision the Land Commission is to decide whether there ought to be apportionment, redemption, or both; and Mr. Jellett's strongest arguments on behalf of the appellants rested on the fact that the Land Commission might not order the redemption of a rent to which the land sold was subject, in which case the purchase-money, or a sufficient part of it, would be invested by the Court, and a sum equal to the

(1) [1900] 1 I. R. 151.

rent would be paid on the gale days out of the dividends. It is argued that as redemption is merely an alternative, it ought to be carried out so as to produce the same result, and that, therefore, the price ought to be fixed at a sum which, if invested in Court securities, would produce an annual return equal to the rent. I am of opinion that this is not the reasonable inference from the section. The Land Commission may or may not order redemption; but if the order is made, the effect is the same as if the rent was acquired under compulsory powers conferred by statute, and the price ought to be fixed on the principles applicable when such powers are exercised. I shall presently refer more at length to these principles; but I desire to complete my observations on the proposition with which I am now dealing.

I think my view of the effect of the order for redemption made under the Act of 1887 is confirmed by section 31 of the Act of 1896, which, as was decided by this Court in *Owen's Estate* (1), makes the redemption or satisfaction not only of rents and rentcharges, but of all the superior interests defined therein, compulsory. These interests include fees, duties, services, estates, exceptions, reservations, covenants, conditions, and agreements, contained in any fee-farm grant or other conveyance in fee. The sum to be paid as the price or satisfaction for these interests is to be ascertained by the same machinery as is prescribed in the case of rents and rentcharges; and all are included in the same definition. It is clear that in case of such exceptions and reservations as minerals, timber, and turbary, what is to be regarded is their value to the owner as interests in the lands before he was deprived of them by compulsion; and I think that this also is the principle applicable to rents and rentcharges. Mr. Ronan deems it of importance to his argument on this branch of the case to fix the time at which the value of the fee-farm rent is to be ascertained. He says that the statute does not contemplate the owner of the rent being brought into privity with the matter until the order for redemption is made, or, at the least, until the purchase-money is lodged in Court, and the claims in respect of superior interests transferred thereto. He argues that at these dates the lands are

(1) [1900] 1 I. R. 151.

Appeal. 1905. *In re* CLOSE'S ESTATE. Holmes, L.J.

discharged from the rent, and the claim is a claim against the purchase-money alone. This is true, but I do not see how it helps to solve the question as to what is the nature of the claim. If I am right that the claim of the owner is for the value of the rent of which he has been deprived, it seems to me to be immaterial that it is to be discharged when ascertained out of a fund in Court.

For these reasons, I am unable to accept the proposition with which I have been dealing in the only sense in which it was pressed upon us, and in the only sense in which it would benefit the appellants; and I hold that Mr. Justice Meredith was right in not acting on it.

Having come to this conclusion upon what I think is the foundation of the appellants' case, I can deal with the other arguments advanced on their behalf with comparative brevity. They all tend in the same direction, and are, I think, pervaded by the same fallacy. They seek to show that the rent to which the College was entitled is to be valued on the assumption that it was not an ordinary rent secured by the lands out of which it issued, but that it is to be regarded as possessing some exceptional and peculiar element of value.

It is admitted that the value is to be ascertained as if it were a case of a compulsory purchase of like property under the Lands Clauses Act, and I have no doubt the Judicial Commissioner acted on this basis. It follows as a corollary therefrom that the value and price are to be governed by what the vendor loses, and not by what the purchaser from him gets. But I agree with Mr. Justice Meredith that this principle is of little or no practical application where the property compulsorily taken is an annuity of £1836. There are superior interests as defined by the Act of 1896, such, for example, as turbary or timber, which, from the locality of the lands and the mode of use, may be of exceptional value to the owner. This ought to be taken into account in fixing the price; but I have never heard that personal considerations, wholly unconnected with the property, ought to affect its value. Mr. Ronan gave the instance of a rent of £100 payable to a person who had no other means. To such a person the rent is of much greater importance than

to a man of wealth; but he admitted that this circumstance would not increase the compensation.

It is said that inasmuch as Trinity College must deal with the redemption price for ever as a fund to produce income, and must be careful and prudent in its investments, a higher price must be given for the head-rent than would be awarded to an ordinary owner. Like Mr. Justice Meredith, I have failed to find any authority for this proposition. I think that it would introduce a new and unsound principle into the mode of fixing compensation in cases of compulsory purchase, and I am of opinion that the Judge was right in rejecting it. Indeed, I think that section 39, sub-section 2, of the Act of 1903 recognizes in an emphatic way that the redemption money, when invested by the College, may, and probably will, produce a smaller income than was received before the redemption took place. There is one manifest difficulty in ascertaining the redemption price in the present case. The evidence is that a rent of the magnitude of the rent payable to the College charged on agricultural lands is not at present marketable in Ireland. Therefore, the Judge is left without the guidance of market price, which is always the most important consideration in ascertaining the money value of any kind of property. Still, the head-rent is undoubtedly a valuable interest, and in fixing its redemption price it is the duty of the Judge to take into account every matter relevant thereto. Mr. Justice Meredith has exceptional experience in this branch of land purchase work. Smaller and better-secured head-rents are often bought and sold; and he is familiar with the prices given therefor. He has told us the many circumstances which he has taken into account; and except the matters with which I have already dealt, and which I agree with him ought not to affect the value, I am of opinion that he has omitted or overlooked nothing material. Indeed, the only point to which it is complained that he did not give due weight, is the right of the owner to be indemnified from loss consequent on redemption. It is said that, misled by the order in *Leader's Estate* (1), he excluded from consideration this right to indemnity. But before I offer any opinion on this point, I must settle

(1) [1904] 1 I. R. 368.

Appeal. 1905. *In re* Close's Estate. Holmes, L.J.

what the right is. If it is a right in the owner of the rent to receive such a sum as will enable him to acquire an equal income equally well secured, I understand, and am prepared to accept it. But although this is in terms Mr. Jellett's own proposition, it is not what he pressed on the Court. He dropped the important words "equally well secured," and he claimed such a sum as, if invested in the highest class of securities, would bring in an annual income equal to the rent. This was also his contention before Mr. Justice Meredith, who asked him what he meant by his problem, and who received the reply that his clients should be awarded such a sum of money as, invested at 3½ per cent., would produce £1836. Counsel, in arguing thus, forget that money can be invested so as to give an annual return of 3½ per cent. in securities far superior in character and stability to the land out of which the rent issued. In fact, Mr. Justice Meredith was asked to do what this Court disapproved of in *Leader's Estate* (1). In that case we had reason to believe that the Land Judge, in carrying out the redemption of a fee-farm rent, was of opinion that he ought in all cases to fix a price which, if invested in gilt-edged securities, would yield the owner an income equal to the rent. This might be quite right if the land on which the rent was charged was equivalent to a gilt-edged security; but in most cases it is nothing of the kind. To act on this principle would have the effect of giving the owner a more valuable property than he had before; and the order of this Court was made with a view to correct this error.

I have carefully considered the references of Mr. Justice Meredith to that order; and I am satisfied that he understood it in the sense intended. The result is that neither in this nor in any other matter of principle have I found a mistake in his assessment of the value of the College rent; and I have no reason to think that the sum fixed by him is not full and adequate.

In placing a value on property for which there is no market, there is room for much difference of opinion, and a conclusion that will satisfy every mind cannot be hoped for. In the present case there are reasons by which a smaller award might

(1) [1904] 1 I. R. 368.

be justified. There can be no doubt that before the sale of the estate the fee-farm rent payable to the College was very indifferently secured. The rental had been falling for a long time; and it is pretty certain that the margin of solvency, already very attenuated, would have soon disappeared altogether. A prudent stockbroker would have no difficulty in investing £45,000 so as to return an income equal to, and much better secured than, the rent. In such circumstances it might be thought that the redemption price is somewhat excessive. But there are counter-considerations presented forcibly, although with some exaggeration in the figures, by Mr. Ronan. The price paid for the tenants' holdings amounts to a little over twenty-four years' purchase of their rents. The sum payable to the College is about twenty-four and a-half years' purchase of the head-rent. In this contrast there is nothing anomalous; but it appears that while the head-rent has been paid punctually by Mr. Close, the collection of his rents from the tenants has been attended with trouble and expense, measured by the landlord at £217 a year. When this is taken into account, the price paid for the tenants' interests represents almost twenty-seven years' purchase of the net rental; and Mr. Ronan dwells strongly on the disproportion between this and the twenty-four and a-half years' purchase awarded to his clients. In making the foregoing calculations I have not deducted from the purchase-money the costs of sale and of making title; but even with a liberal allowance therefor, the disproportion would be considerable. There is, however, one important circumstance that cannot be overlooked in contrasting the two amounts. The purchase-money paid to Mr. Close represents a price artificially created. For reasons of public policy great inducements have been held out by statute to tenants to buy from their landlords, and to the latter to sell. The former are enabled by means of state advances to offer prices considerably in excess of the value of their holdings tested by any standard with which I am acquainted. But the market thus created is confined to the tenant in occupation and his immediate landlord, and owners of superior interests have no direct share therein. I am far from suggesting that the amount of the purchase-money in Court is not a most important element in ascertaining the value of the head-rent.

Appeal 1905. *In re* Close's Estate. Holmes, L.J.

Mr. Justice Meredith so regarded it; but I am of opinion that it cannot be made the sole or even the most important criterion by which to measure the redemption price of the superior interests. Taking it into account in the fullest way, I have come to the conclusion that the redemption price fixed by the Judicial Commissioner is ample, and that the appeal ought to be dismissed.

Solicitors for the appellants: *Maunsell, Darley & Orpen.*
Solicitors for the respondent: *Richardson & Synnott.*

G. Y. D.

IN RE O'DONNELL AND TODD'S CONTRACT (1).

Appeal. 1904. Oct. 26.

Vendor and purchaser—Sale of tenancy by mortgagee in possession—Condition of sale—Arrears of rent—Rent legally due and owing—Payment of two years' arrears under sect. 16 *of Land Act of* 1896 (59 & 60 *Vict. c.* 47) *—Landlord's right to arrears of rent.*

H. S., in 1893, mortgaged a farm, of which he was tenant from year to year, to W., to secure £400. In May, 1899, W. died, having by his will appointed D. and G. his executors. The rent fell into arrear, and on the 8th December, 1900, the landlord recovered judgment for £500, which he registered as a mortgage against the lands of S. In October, 1900, the landlord obtained a decree in ejectment against S. for five years' arrears of rent, to May, 1901, amounting to £480. Caretakers' notices were served on the 30th November, 1901, claiming £162, being two years' rent. The solicitors for the executors paid to the landlord the sum of £162, and having brought ejectment proceedings against S., recovered possession of the farm on the 1st August, 1902.

On the 27th May, 1903, the executors put up the farm for sale, under conditions of sale, the 5th of which stated that all rent legally due and owing by the vendors as mortgagees of S. would be cleared in respect of the premises up to the 1st November, 1902. T. was declared purchaser at £880, and by his requisitions the purchaser required the vendors to produce the receipt for the rent up to the 1st November, 1902. The vendors, relying on sect. 16 of the Land Act, 1896, declined to pay all the arrears, but undertook to pay all rent due since the date of the ejectment proceedings by the landlord. The landlord's agent informed the purchaser on the 19th June, 1903, that he would not accept a new tenant of the farm while any of the arrears of rent were unpaid:

Held (affirming the decision of Kenny, J.), that the balance of three years' arrears of rent remained a debt due to the landlord, who could refuse his assent to the sale, and that until his claim was satisfied the purchaser could not be forced to complete the sale.

IN and prior to 1893, Henry Swan held portion of the lands of Summerhill, in the county of Donegal, comprising 93 acres, as tenant from year to year, from H. G. Murray Stewart, at the rent of £80 a-year.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, WALKER, and HOLMES, L.JJ.

Appeal. 1904.

In re O'Donnell and Todd's Contract.

By indenture dated the 23rd December, 1893, Henry Swan mortgaged the said lands to John Welsh to secure the repayment of £400. On the 19th May, 1899, John Welsh died, having previously made his will dated the 15th November, 1895, whereby he appointed the Most Rev. Dr. O'Donnell, the Right Rev. Francis Gallagher, and Hugh Bonnar, executors, to whom probate was granted on the 2nd August, 1899. The interest on the mortgage was regularly paid by Swan to Welsh during his life, and after his death to his executors.

The rent of the land was allowed by Swan to fall into arrear, and on the 1st June, 1900, the landlord issued a specially endorsed writ claiming £500 rent due by Henry Swan, of which sum £400 represented five years' rent due in respect of the lands of Summerhill. Judgment was marked on the 8th December, 1900, and the judgment was registered as a mortgage against the lands held by Henry Swan, including the lands of Summerhill, on the 11th September, 1901.

On the 8th October, 1901, the landlord, H. G. Murray Stewart, obtained a decree in ejectment for non-payment of rent against Henry Swan in respect of the lands of Summerhill for five years' rent, amounting to £431 16*s.* 6*d.*, up to the 1st May, 1901; the said rent included the rent for which judgment had been previously obtained on the 8th December, 1900. Caretakers' notices were served on the 30th November, 1901, claiming £160, being two years' rent, and £2 5*s.* for costs. The solicitor for the executors of John Welsh paid the landlord the sum of £162 5*s.*, being two years' rent and costs. The executors of John Welsh brought an ejectment against Henry Swan, and recovered judgment on the 12th July, 1902; and possession of the premises was handed over by the sheriff to the executors on the 1st August, 1902.

On the 27th May, 1903, the executors put up the lands of Summerhill for sale, under conditions of sale. By the 5th condition it was provided—

> "All rent legally due and owing by the vendors as such mortgagees to the landlord shall be cleared in respect of said premises up to the 1st day of November last, and all rates and taxes in respect of said premises will also be paid up to that date."

Robert Ross Todd was declared the purchaser at the sum of £880. In his requisitions on the title, the purchaser required production of the receipts for rent by the landlord clearing the arrears to the 1st November, 1902. To this the vendors replied—"All rent from date of ejectment decree will be paid by vendors. As to prior rent, the vendors rely on 59 & 60 Vict. c. 47, s. 16, and produce receipt for two years' rent and costs dated 29th May, 1902."

The purchaser also required an intimation from the landlord that he would agree to accept the purchaser as his tenant. To this the vendors replied—"Name of purchaser has been furnished to the landlord, and no objection had been made by him."

The purchaser further required that a satisfaction piece should be entered up in respect of the landlord's judgment mortgage.

The landlord's agent informed the purchaser on the 19th June, 1903, that he would not accept a new tenant for the farm while any of the arrears were outstanding. It appeared that, so far as the purchaser knew, the Ulster custom prevailed on the estate, and that the sale was made under the custom.

R. Ross Todd was the solicitor who acted for the landlord during the entire proceedings, but he purchased the farm in his individual capacity.

On the 2nd May, 1904, the vendors issued a summons for an order that the objections to the title to the lands had been sufficiently answered, and that good title had been shown. On the 10th June, 1904, Kenny, J., sitting for the Master of the Rolls, held that the requisitions were reasonable, and that the landlord could refuse his assent to the sale until all the arrears of rent had been paid. From that decision the vendors appealed.

Henry, K.C., and *P. Law Smith*, for the appellants:—

'The question is, What is the effect of section 16 of the Land Act of 1896 as between vendor and purchaser? The object of section 16 was to get rid of all claims for rent against the holding. The arrears of rent due prior to the two years' rent which the vendors paid are not chargeable in respect of the holding. The landlord could not sue the purchaser for the rent, because he had previously sued Swan for that rent, and recovered judgment: the

Appeal. 1904. *In re* O'Donnell and Todd's Contract.

claim for the rent is merged in the judgment: *Chancellor* v. *Webster* (1); *Potter* v. *Bradley* (2); *Wakefield* v. *Smythe* (3). The condition of sale means if any rent can be recovered out of the holding you are entitled to be freed from that rent by the vendors, otherwise not. There is not any claim for rent against the holding which the landlord can enforce. If it is only a personal remedy, which can be made available against the mortgagees, the purchaser is not liable.

J. Wylie, K.C., and *T. Henry Maxwell*, for the purchaser, were not called on.

Lord Ashbourne, C.:—

We do not think it necessary to ask for any assistance from counsel for the respondent. We are all clearly of opinion that the judgment of Kenny, J., was right. In reality Mr. Henry, in his argument, wants us to misread, or give an unnatural meaning to, the 5th condition of sale, and to read words into it which are not there at all. The 5th condition provides that "All rent legally due and owing by the vendors as such mortgagees to the landlord shall be cleared in respect of said premises up to the 1st day of November last, and all rates and taxes in respect of said premises will also be paid up to that date."

As Walker, L.J., pointed out, Mr. Henry's argument amounts to this, that the words of the condition should be read "rent legally due and recoverable by ejectment or distress." The words are to be confined to the two years' arrears, and everything else is to be wiped out. That would certainly be doing extreme violence to the language. Then Mr. Henry said the real meaning of section 16 of the Act of 1896 was that once the two years' rent is paid, it is to be segregated, and the rent ceases to be in arrear. It does not cease to be in arrear, though it cannot be counted as an arrear of rent for the purpose of supporting an ejectment for non-payment of rent. I cannot give that construction to section 16 which is sought to be imputed to it. There is no ground for the argument addressed to us. In my opinion the decision of Kenny, J., was right and should be affirmed, and the appeal dismissed with costs.

(1) 9 T. L. R. 568. (2) 10 T. L. R. 445. (3) 16 Ir. C. L. R. 173.

FITZ GIBBON, L.J. :—

I do not think it necessary on a vendor and purchaser summons to decide every question that arises. The crucial question is whether a clear title has been shown to the land. That cannot be done unless the landlord accepts the purchaser as his tenant. The 5th condition of sale was introduced for the purpose of satisfying the purchaser that one possible cause of refusal would be obviated by payment by the vendors of all rent legally due up to the 1st day of November last. On that condition I think the case is quite clear, because the balance of rent over and above the amount paid in the ejectment has not been paid. The landlord has refused to accept the purchaser as his tenant, and until the full amount due for arrears of rent has been paid, the landlord is not bound to accept the purchaser as his tenant, under the Land Act of 1881, section 1 (9).

WALKER, L.J. :—

The meaning of the condition is that all arrears of rent up to the 1st November were to be paid, and the receipts produced. It is admitted that there are arrears due prior to that; consequently a good title has not been shown.

HOLMES, L.J. :—

I have read the judgment of Kenny, J., with which I agree. After the holding had been redeemed by the payment of two years' rent, as provided by the 16th section of the Land Law (Ireland) Act, 1896, the balance of the rent then due was recoverable by the landlord from the tenant by the very terms of that section. Section 1, sub-section 9, of the Act of 1881 enables the landlord to refuse to accept the purchaser as tenant until the above-mentioned rent was paid; and it is stipulated in the conditions of sale that this should be paid out of the purchase-money. This was necessary for the protection of the purchaser, and it is clear that he is entitled to have the stipulation fulfilled.

Solicitor for the vendors: *Michael Maguire.*
Solicitor for the purchaser: *Elliott M'Neill.*

R. D. M.

Ross, J.
1905.
Feb. 7.
Appeal.
April 18.

In the Matter of the Estate of DOMINICK O'DONNELL, Owner and Petitioner.

Executor and administrator—Administration—Payment of debts and legacies—Mortgage by administrator—Payment of debts and to one of the next-of-kin—Mortgage in due course of administration.

By mortgage, dated the 10th February, 1876, D. O. mortgaged the lands for sale in the matter to G. L., to secure the sum of £350. G. L. died on the 11th August, 1878, intestate and unmarried, leaving him surviving six brothers and one sister, his only next-of-kin. On the 23rd September, 1878, letters of administration to his estate were granted to J. L., a brother of the deceased.

On the 20th December, 1886, J. L. executed a sub-mortgage of the mortgage of the 10th February, 1876, to H., to secure the repayment of £200. At the time the sub-mortgage was executed J. L. stated to H. that he required the money partly for the purpose of paying the debts of G. L., and also to pay one of the next-of-kin who was going abroad:—

Held (affirming the decision of Ross, J.), that the mortgage was made in the ordinary course of administration, and was a valid mortgage.

Objection by S. C. M'Cormick, the solicitor having carriage, to item 10*b* on the final schedule of incumbrances, being a sub-mortgage dated the 20th December, 1886, from James Latchford to Alfred Henry of a mortgage for £350, dated the 10th February, 1876, from the owner to George Latchford, deceased, to secure to Alfred Henry the sum of £200, on the ground that the charge vested in Alfred Henry only affected the beneficial interest of the said James Latchford as one of the seven next-of-kin of George Latchford.

By a mortgage dated the 10th February, 1876, Dominick O'Donnell (the owner) mortgaged the lands for sale to George Latchford to secure £350 with interest at 8 per cent.

George Latchford died on the 11th August, 1878, intestate and unmarried, leaving him surviving six brothers and one sister, his only next-of-kin, viz. Richard Latchford, John Latchford, William Latchford (since deceased), Henry Latchford, James

Latchford, and Edward Latchford and Mary Latchford (both deceased).

Letters of administration to his estate were granted on the 23rd September, 1878, to the said James Latchford, then a solicitor practising in Dublin.

The personal estate of the said George Latchford amounted to the sum of £1291 12*s.*, of which £357 5*s.* 3*d.* consisted of cash, shares which were sold by James Latchford, and rents due to the deceased George Latchford, all of which, it was sworn, were received by James Latchford. The debts and funeral and testamentary expenses were returned at £229 16*s.* 10*d.*

By deed dated the 30th September, 1881, James Latchford, in consideration of £100, assigned his one-seventh share in the assets to his brother, Edward Latchford; but this deed was not registered.

James Latchford applied to Alfred Henry for a loan of £200, and he stated that he was borrowing the money for the purpose of paying certain debts of George Latchford, deceased, and also of paying his distributive share of the assets to a younger brother, one of the next-of-kin, who, the said James Latchford stated, was going abroad. By indenture dated the 20th December, 1886, James Latchford executed to Alfred Henry a sub-mortgage of the said mortgage of the 10th February, 1876, to secure the repayment of the said sum of £200, with interest at 8 per cent. This sub-mortgage recited the mortgage of the 10th February, 1876, the death of George Latchford, and the grant of letters of administration to James Latchford, and then James Latchford assigned the mortgage debt as beneficial owner to Alfred Henry, and granted the lands as mortgagee to Henry, subject to redemption.

By an order dated the 14th July, 1885, the carriage of the proceedings in this matter was transferred to James Latchford as first incumbrancer, and on the 20th December, 1886, an order was made transferring the carriage from James Latchford to Alfred Henry. This latter order was made on consent, and on the same day on which the sub-mortgage was executed.

In 1887 James Latchford went to Australia, and had not returned to Ireland.

Ross, J.
1905.
In re O'Donnell's Estate.

By order of Andrews, J., the grant of administration made to James Latchford was revoked, and letters of administration *de bonis non* of the effects of George Latchford were, on the 7th July, 1903, granted to Richard Latchford.

H. Wilson, K.C., and *C. Brady*, in support of the objection.

John Gordon, K.C., and *John Donaldson*, for A. Henry.

Ross, J. :—

When this case had been opened, I at first thought that Mr. Henry had been somewhat rash in lending his money under the circumstances, firstly, because it was lent to an administrator after eight years had elapsed, when the ordinary debts should have been in due course paid; secondly, because it was lent on a sub-mortgage, reserving such a high rate of interest as 8 per cent., and, thirdly, because it was represented to him that the money was required not merely for the purpose of paying debts, but also for the purpose of giving his share to one of the next-of-kin, who was about to leave the country. However, I have further investigated the circumstances of the case and the law. The circumstances are shortly these :—The mortgage was charged on lands in the County Mayo, not a very satisfactory security, as indicated by the fact that the interest was at the rate of 8 per cent. That being so, there was no reason why a lower rate of interest should be paid on the sub-mortgage. The fact that eight years had elapsed from the date of the death is not a sufficient reason to make the lender suspicious. In the cases cited even longer periods of time had elapsed between the date of the death and the loan. If Mr. Henry advanced the money to pay himself a personal debt, I should not allow it to stand; or if he knew that the administrator was about to leave the country, I should not allow it to stand. But that—the first case—is completely disproved by the production of the cheque for £193. There is no evidence whatever that Mr. Henry was aware that the administrator was about to leave the country. How could fraud be imputed? If Latchford said, "I require the money for the purposes of administration," it has been admitted that the sub-mortgage must stand.

What he did say was—"I require it for the payment of debts, and to make a provision for one of the next-of-kin." Both these statements were in fact false. But was there any reason that Mr. Henry should disbelieve them? How could the business of winding-up estates be carried on if every such statement requires to be investigated? It is of great importance that executors or administrators should not be unduly interfered with.

The law is plain enough. When money is borrowed by a personal representative, whether an executor or administrator, as such, the lender is not bound to see to the application of the money. There might be circumstances to suggest fraud; but I cannot see any in the present case. Mr. Henry believed the statement. What reason was there for disbelieving it? The executor must pay the debts and distributive shares in some order. Was there a breach of trust in advancing his share to one of the next-of-kin? Mr. Brady said it was not *prima facie* a breach of trust. How is Mr. Henry concerned if there was no actual breach of trust, or anything to lead him to suspect that a breach of trust was intended? His security cannot be touched, and I must keep it on the schedule, and disallow the objection.

W. C. S.

Richard Latchford appealed (1).

H. Wilson, K.C., and *C. Brady*, for the appellant:—

This sub-mortgage was not made in the ordinary course of administration. In so far as the money raised by the mortgage was used to pay debts, it might have been made in the ordinary course of administration, but in so far as it was used to pay one of the next-of-kin his share, it was not. There is no power in the administrators to raise money by mortgage to pay one of the next-of-kin his distributive share. The bond of an administrator was a statutory obligation, under 7 Wm. 3, c. 6 (Ireland),

(1) In the Court of Appeal, before LORD ASHBOURNE, C., and WALKER and HOLMES, L.JJ.

Appeal. 1905. *In re* O'Donnell's Estate.

and 20 & 21 Vict. c. 79, and the obligation was to pay the debts of the deceased, and all the rest of the personal estate to deliver and pay to the persons entitled according to the statute. The sub-mortgage can only affect the portion of the mortgage to which James Latchford was entitled beneficially, and does not affect the entire assets. Each of the next-of-kin has a specific interest in each portion of the assets, and except to pay debts the administrator cannot part with, or mortgage, the assets: *Tevlin* v. *Gilsenan* (1); *Cooper* v. *Cooper* (2).

An administrator has no power to mortgage leaseholds of the intestate, under leases not containing repairing covenants, in order to raise money for repairing the property. Such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised: *Ricketts* v. *Lewis* (3); *Watson* v. *Watson* (4).

Gordon, *K.C.*, and *Donaldson*, for the respondent:—

An executor or administrator cannot make a valid sale or pledge of the assets as security for, or in payment of, his own debt: *Miles* v. *Durnford* (5). But a personal representative can sell or mortgage the assets for the purpose of paying debts; and if portion of the money is required to pay one of the next-of-kin, that cannot vitiate the whole. The transaction was perfectly *bona fide*, and unless the person lending the money had knowledge of some illegal purpose to which it was about to be applied, it is a good mortgage. [They referred to *Venn & Furze's Contract* (6).]

Lord Ashbourne, C.:—

This is an appeal from an order of Judge Ross, which raises an interesting point. It appears that in the administration of the business of his Court he had to consider a sub-mortgage of a mortgage made originally for £350. The mortgage was made to a man named George Latchford, who died intestate, leaving an estate to be administered. In the course of the administration his

(1) [1902] 1 I. R. 514.
(2) L. R. 7 H. L. 53.
(3) 20 Ch. D. 745.
(4) [1901] 1 Ch. 681.
(5) 2 De G. M. & G. 641.
(6) [1894] 2 Ch. 113.

personal representative borrowed from Mr. Henry a sum of £200 which he secured by a sub-mortgage of the original mortgage for £350, and he stated that he required the £200 to pay some of the debts of the deceased, and also to pay a share to one of the next-of-kin. Mr. Henry now comes in asking for payment of this sum of £200, and he is met with the objection—This was not a mortgage made in due course of administration, and you have no right to look for payment to the proceeds of the sale of the lands. The whole question is—Is this sub-mortgage to be regarded as made for the private purposes of the administrator, and not made by him as personal representative, as stated on the face of the mortgage, to raise £200 to be applied for the purposes of the administration? Ross, J., held it was a mortgage rightly made in due course of administration, and he overruled the objection. From that decision an appeal has been taken, and it was argued—not that the mortgage was not *bona fide*, not that Mr. Henry's conduct was open to question—but that because the mortgagor stated to Mr. Henry that the money was required to pay off debts, and also to pay one of the next-of-kin, though it would be right so far as payment of debts is concerned, yet the whole thing is invalid, because the mortgagor stated he wanted portion of the money to pay one of the beneficiaries. The narrow way in which the case was presented by Mr. Wilson and Mr. Brady was that though the mortgage was rightly executed, so far as the payment of debts was concerned, yet in so far as the money was used to pay one of the beneficiaries it was invalid, and that that so tainted the whole, that it would invalidate the entire mortgage. As Mr. Wilson put it, if an administrator went into the market to borrow money for the purposes of the administration, if he borrowed £1500 for payment of debts, and £50 to pay one of the next-of-kin, the mortgage would be void.

I think that in this case the payment to the next-of-kin might be reasonable and proper, and that Ross, J., was right in his view of the case. This was a *bona fide* advance to an administrator, describing himself as such, for purposes none of which were personal to himself. I am, therefore, of opinion that the order appealed from should be affirmed, and that the appeal should be dismissed with costs.

Appeal. 1905. *In re* O'Donnell's Estate.

Walker, L.J. :—

I concur. This mortgage was made twenty years ago, in 1886, eight years after the death of the intestate, at a time when there was no presumption that the debts were paid. The administrator applied for a loan, and he told Mr. Henry, to whom he applied, that he wanted the money to pay debts, and also for the purpose of making an advance to one of the next-of-kin. In my opinion both these objects were for the purpose of administration—(1) to pay debts; and (2) to pay one of the next-of-kin. The transaction did not involve a private debt, and was not a *devastavit*. We are asked by the appellant to say that it was a bad mortgage from first to last. That I am not prepared to lay down. I think that an advance may be obtained by an administrator to pay a portion to one of the next-of-kin without committing a *devastavit*. There is nothing to show that it was a *devastavit*, beyond this—that one of the objects for which the money was advanced was for the purpose of paying one of the next-of-kin. That is a purpose of administration, though payment of debts comes first. It is as much the duty of an administrator to pay the next-of-kin as to pay the debts of the deceased.

Holmes, L.J. :—

In 1886 James Latchford was the administrator of George Latchford's estate, part of which consisted of a mortgage. I am satisfied on the facts of the case that it was impossible to get in the whole of this mortgage at the time. It could not have been realized in the Land Judge's Court at that time, and it has not been realized since. Therefore, in 1886 the administrator had vested in him a mortgage which could not be realized. The administrator requiring money borrowed the amount from a lender, telling him that he wanted it to pay debts, and also to pay one of the next-of-kin portion of his demand. Under these circumstances the question is—Was it a good mortgage, for the ordinary purposes of administration? So far as the money raised by the mortgage was required for the payment of debts, it was a good mortgage; but I think that an administrator may also make an advance to one of the next-of-kin, without committing a *devastavit*,

and that he can raise the money by sale or mortgage for that purpose without any illegality. That is the ground of the decision of Ross, J.; and I think it is right.

Solicitor for the appellant: *S. C. M'Cormick.*
Solicitor for the respondent: *A. Henry.*

R. D. M.

IN THE MATTER OF THE ESTATE OF THE MOST HON. JOHN HENRY, MARQUIS OF ELY, OWNER AND PETITIONER.

Land Judge's Court—Practice—Dismissal of petition on application of tenant for life—Consent of incumbrancers—Opposition by remainderman.

Where the owner, a tenant for life, with the consent of the incumbrancers, or on his undertaking to pay them off, applies to have a petition for sale dismissed, the application may be granted notwithstanding the opposition of the remainderman.

APPLICATION on behalf of the owner and petitioner, that on his undertaking forthwith to lodge and file in the offices of the Estates Commissioners an originating application in the prescribed Form A, for the sale by him, as tenant for life, under the provisions of the settlement of the 7th December, 1875, of the hereditaments and premises known as the Wexford estate, being portion of the hereditaments and premises comprised in the absolute order for sale, for the purpose of effecting out of Court a sale of the Wexford estate to the tenants thereon, under the Irish Land Acts, 1903 and 1904, at prices to be provided by the agreement for sale in the prescribed Form F, the petition herein should be dismissed, so far as regarded the Wexford estate.

The main question was as to the right of the remaindermen, as represented by the trustees of the settlement and will of the late Marquis of Ely, to have the application refused on the ground that the absolute order for sale enured for their benefit as well as for the benefit of the incumbrancers, and as to whether the

Ross, J.
1905.
In re Ely's Estate.

consent of such remainderman or his trustees was essential to give the Court jurisdiction to dismiss any part of the proceedings out of Court. The particulars of the estate are set out in *In re Ely's Estate* (1).

O'Brien, K.C. (with him *Ronan, K.C.*, and *Littledale*), for the owner:—

The owner desires to take the estate out of Court. He has either the consent of all the incumbrancers, or they have had an opportunity of presenting their views to the Court, and they do not oppose; the trustees for the remainderman cannot prevent his doing this. [The following cases were cited:—*In re Kemmis' Estate* (2); *In re Bunbury's Estate* (3); *In re Owens' Trustees' Estate* (4); *In re Harenc's Estate* (5); *In re Buswell's Estate* (6)].

Matheson, K.C. (with him *S. L. Brown, K.C.*, and *W. M. Crozier*), for Messrs. Tottenham and Lethbridge, trustees of the settlement, and for Lord George Herbert Loftus, entitled to a life estate on the death of the Marquis of Ely, and for Lord Adam Loftus, the presumptive tenant in tail:—

We do not consider the terms of sale sufficient. The absolute order enures for the benefit of all those who are interested in the estate. The owner can, under the Irish Land Act, 1903, sell as tenant for life, and we may receive no notice till the estate is sold. The Court of Chancery once it had ordered a sale would not discharge that order without being satisfied that no injury would be done to us.

S. L. Brown, K.C.:—

There are only two ways in which, on the application of a tenant for life, a petition can be dismissed—(1) by the provisions of some statute; or (2) under some decision. Neither a statute nor a decision has been relied on by the other side.

Leech, for the Royal Exchange Insurance Company, incumbrancers, supported the case of the owner.

(1) [1904] 1 I. R. 66.
(2) *Ibid.* 496.
(3) [1901] 1 I. R. 248.
(4) [1897] 1 I. R. 200.
(5) 1 L. R. Ir. 428.
(6) 5 L. R. Ir. 349.

Ronan, K.C., in reply:—

The proceedings in this Court are under a limited statutory authority; and the Court can only sell sufficient to discharge incumbrances; this is different from a sale of the fee-simple by a Judge of the Chancery Division. If the trustees and the remainderman have any equity, they can attempt to enforce it in the Chancery Division in an action to restrain the sales; but the prices being within the zones, no Court would interfere.

Ross, J.:—

I have already expressed my opinion as to the law on this very question, and I adhere to that opinion.

If a tenant for life presents a petition for sale in order to discharge incumbrances on the fee, as soon as the incumbrances are discharged, the duty of the Court is at an end, and it is no longer necessary to go on to do what the Court was not asked to do. When after a sale the incumbrances are satisfied, or when the incumbrancers join with the owner and apply to have the petition dismissed, I have always granted the application without notice to the remainderman. I have ascertained from the officers that this practice has been in operation so long as memory goes back. I am now asked to refuse the motion because the law has been changed by the Settled Land Acts and the Land Acts; that is to say, I am asked to retain the estate here in order to prevent the tenant for life doing what the law says he is at liberty to do.

I cannot see any reason for altering the settled practice of the Court, and I accordingly dismiss the petition.

Solicitors for the Marquis of Ely: *Scallan & Co.*

Solicitors for Messrs. Tottenham and Lethbridge: *Crozier & Son.*

Solicitors for the Royal Exchange Assurance Company: *Anderson & Bland.*

W. C. S.

NOTE.—*July* 24, 1905.—The matter was re-entered on this day, when it appeared that some of the incumbrancers who had only entered appearances after the last hearing did not consent to the application. Ross, J., directed that it should be made a term of his order that they should be paid off.—W. C. S.

M. R. 1905.

Feb. 15, 16, 23.

Appeal. May 15, 16, 18.

WADDELL *v.* HARSHAW.

Limitations, Statute of—Legacy—Accruer of right—Death of testator— 37 & 38 *Vict. c.* 57, *s.* 8.

In an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death.

Decision of the Master of the Rolls *contra* reversed in the Court of Appeal.

By his will, dated the 3rd October, 1887, Andrew Harshaw bequeathed a legacy of £150 to his daughter, Mary Harshaw, £100 to his son, James, and £50 to his daughter, Eleanor Waddell; and he appointed his sons, Andrew and James, executors, and he charged these legacies on the two farms he held on the townland of Ballynafern, in the county of Down. He bequeathed one of his farms to his son, Andrew Harshaw, and the other to his grandson, Andrew (the son of his son, Joseph, who had predeceased him).

The testator died on the 6th February, 1891, and probate was granted to his son, Andrew Harshaw, the younger, on the 18th May, 1892. Andrew Harshaw, the younger, died on the 2nd May, 1903, having by his will, dated the 22nd May, 1900, left his farm to his nephew, John Harshaw, and he appointed his two nephews, Andrew and John Harshaw, executors, to whom probate was granted on the 11th November, 1903.

Mary Harshaw, one of the legatees, died on the 30th April, 1900, intestate, and on the 25th January, 1900, letters of administration to her personal estate were granted to Eleanor Waddell.

None of the legacies had been paid, and on the 29th January, 1904, an action was brought by Eleanor Waddell and James Harshaw against Andrew and John Harshaw for payment of the legacies. The defendants pleaded the Statute of Limitations.

John Gordon, K.C., and *M'Ilroy*, for the plaintiffs.

S. L. Brown, K.C., and *F. N. Greer*, for the defendants.

M. R.
1905.

WADDELL
v.
HARSHAW.

Feb. 23.

THE MASTER OF THE ROLLS:—

The question which I have now to decide is one which determines the right to administer the estate of Andrew Harshaw, and depends on whether or not a legatee under the will is barred by the Statute of Limitations. The fact, as regards the legacy, is that the testator's death occurred more than twelve years before the issue of the writ, and less than thirteen.

The Statutes of Limitation applicable to the question of this legacy are—(1), 3 & 4 Wm. 4, c. 27, s. 40, and that provides: "After the said thirty-first day of December, 1833" (that is more than seventy-one years ago), "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after *a present right to receive the same* shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment," and so forth.

That section is repealed, and in lieu thereof was enacted (2), the 37 & 38 Vict. c. 57, s. 8, which for present purposes, and so far as a legacy is concerned, is identical with the previous provision, except for the substitution of twelve for twenty years. Sect. 8 provides—"No action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after *a present right to receive the same* shall have accrued to some person capable of giving a discharge for or release of the same."

The question here, in an action to recover a legacy, is whether the executor's year is to be regarded or disregarded; for the action is brought more than twelve years from the death of testator, but less than thirteen, *i.e.*, within twelve years from the expiration of one year from the death. This question is *res nova*.

Apart from authority—and direct authority there is none—

M. R. 1905. WADDELL *v.* HARSHAW.

I should deem it, if not clear, at least the sound view, that in the computation of time the executor's year should be excluded, because till the end of that year the legatee has no power to compel payment of his legacy. Of course he could receive it at any time, but not as of right before that time. The executor may pay legacies if he see fit before that time, but is not compellable to do so—in other words, the legatee has no present *right* to recover the same, to raise it, to call it in, till the year be out.

The word used in the statutes is not "recover," but "receive." The real question is, does this make any difference? Apart from judicial utterances, I should think that it did not. The words are not "the *capacity* to receive," or the "*ability*," or any other word than the *right*, which in my opinion is the dominant governing word—What is a "right to receive" a legacy? This right is spoken of as accruing at a particular time. It cannot therefore mean mere ability to accept something coming from the grace of an executor or anyone else—for every human being has that sort of receptive capacity from infancy to death—and in the case of a legatee, he can "give a discharge for or release of it," whether it is payable or not, *e.g.*, even if there be not assets sufficient to meet it (supposing it to be once paid to him); or if it were a reversionary legacy, the legatee could of course receive it if offered before the reversion fell in, and give a valid discharge. And I think that, in plain ordinary English, a "right" to receive a legacy, more particularly a "present right" to receive it, means a great deal more than a right to accept it if offered. It ordinarily means a right to compel payment of it, and nothing short of that.

What is meant by "a right to call for a transfer" of stock, &c., in the ordinary language of a vesting order under the Trustee Acts? It means not merely a right to ask for a transfer (which needs no sanction), but connotes the consequent right to compel it. And so, in the absence of authority, I should hold, without doubt, that a right to claim, or a right to demand in a legal document, and *a fortiori* a right to receive, means more than an authority to accept. I should, if left to myself, think it must mean a right to recover by legal means.

But though there is no decision actually in point, there are three cases, and three only, which have a bearing on the question. These are *Earle* v. *Bellingham* (*No.* 2) (1); *Re Johnson; Sly* v. *Blake* (2); and *Hornsey Local Board* v. *Monarch Investment Society* (3).

Earle v. *Bellingham* (1) was the case of a legacy payable out of a reversion, and the decision was that interest ran only from the time the reversion fell in. But the judgment clearly shows what the opinion of Lord Romilly was on the question before me. He says (p. 449)—"I think that the Statute of Limitations places the plaintiff in a difficulty from which there is no possibility of escaping. Time runs from the period at which the right to receive the legacy accrued. The right to a legacy, and the right to receive it, is quite a different thing. The right to a legacy ordinarily accrues on the death of the testator, but the right to receive it does not arise until twelve months after his death. There are many cases in which legacies are vested, but no right to receive them exists until a future period, as at twenty-one, or marriage; and, unless there is a particular relation between the testator and legatee, no interest is payable in the meantime, interest being payable only from the time the legacy is receivable. The statute is a bar to the recovery of a legacy twenty years 'after a present right to receive the same shall have accrued'; and my opinion is, that the period from which interest is payable and from which the statute runs is identical, namely, the time when the right to receive accrues. It would be unfortunate if it were established, that these legatees had a present right to receive their legacies twelve months after the death of the testatrix, for that would make the statute applicable to this case. My opinion is that the payment of the legacies is postponed until the reversion fell in, and that interest does not run until the legacies were payable, which was on the death of the widow."

In re Johnson; Sly v. *Blake* (2), conversant not with a legacy, but with a distributive share in intestacy, has less bearing upon the present question, but has to be considered as the decision of a very careful and learned Judge. After deciding that the

(1) 24 Beav. 448. (2) 29 Ch. D. 964. (3) 24 Q. B. D. 1.

M. R. 1905.

WADDELL v. HARSHAW.

23 & 24 Vict. c. 38, section 13, applied retrospectively, his Lordship says:—"The second question turns on the meaning of the words 'present right to receive the same.' The intestate Johnson died in 1848, and the defendants contend that the plaintiff's right was barred at the end of twenty years from his death, or at all events of twenty-one years, the additional year being conceded in conformity with the general rule that an executor or administrator is allowed in an administration case one year to complete the administration of the estate. In the absence of any special circumstances relating to the getting in of an intestate's estate, I think that the latter contention is correct, and that the plaintiff's claim for the general administration of the intestate's estate is barred. The decree of 1855 obtained by Ann Johnson against the administrator was not prosecuted after 1856. Regard being had to the long lapse of time, more than a quarter of a century, and to the death of T. C. Johnson, the younger, in the interval, it would not be a right exercise of the discretion which is vested in the Court to allow that suit to be revived. But I am of opinion that the claims of the plaintiff in her own right, and as administratrix of her deceased sister, are not barred in reference to such of the assets as came into the possession of T. C. Johnson, the administrator, within twenty years before the 11th of April, 1883, the day on which the writ was issued. These assets include the policy which did not become a claim, and was not received until 1867, and the houses and property forming part of Brooks' estate, in which the intestate had a reversionary interest. T. C. Johnson, the younger, did not obtain a conveyance of this property from Brooks' representatives until 1868. This appears to me to be the date at which the statutory period began to run as to the Brooks asset. True it is that he established his right to the property in 1855 by the decree of that date against Brooks' representatives; but although he had apparently sufficient assets in his hands of the intestate to enable him to perform the condition in that decree for some considerable time before 1868, it was not until that year that he performed the condition by making the payment required, and became entitled to a conveyance. The term 'present right to receive' occurs in section 40 of 3 & 4 Wm. 4, c. 27, as well as in the statute now under consideration,

and, as I have said, the two enactments ought to be construed together. The enactments apply as between the legatees or next-of-kin, on the one hand, and the executor or administrator, on the other hand; and they are for the benefit of the executor or administrator, or their representatives, the object being to afford them a statutory defence against stale demands, which, by reason of the lapse of time, may fairly be deemed to have been satisfied. The right to receive means the right to receive from the executor or administrator, or their representatives, and not from the debtor to the estate, from whom the legatee or next-of-kin has no right to receive. The right to a legacy and the right to receive a legacy are (as was pointed out by Lord Romilly in *Earle* v. *Bellingham* (1)) obviously distinct rights. And the observation applies equally to a share of the residue of an intestate's estate. But the enactments speak not merely of a right to receive, but, emphatically, of a present right to receive. The next-of-kin have no present right to receive from the administrator a reversionary asset belonging to the intestate, before it falls into possession and is possessed by him, nor where he is compelled to take proceedings to recover an outstanding asset before he recovers it or obtains possession of it." It must be noted that sect. 8 of the Statute of Distributions (2) enacts that no distribution of an intestate's estate shall be made till a year after the death—although the right to a share passes to the personal representative of the next-of-kin dying within that period. It seems difficult to conceive that there is a present right to receive that which the Legislature says shall not be paid for a year. It is not too much to say that both these learned Judges were of the opinion that the "present right to receive" a legacy or share under the Statute of Distributions did not arise till a year after the death of the testator or intestate—though there is no point-blank decision in either case upon the point.

Then comes *Hornsey Local Board* v. *Monarch Investment Building Society* (3), which was not the case of a legacy, but of a charge upon lands under the Public Health Act, no doubt under the same section of the statute. There a local authority had, under the Public Health Act, 1848, incurred paving expenses,

(1) 24 Beav. 448. (2) Sect. 4 of 7 Wm. 3 (Ir.), c. 6. (3) 24 Q. B. D. 1.

M. R. 1905. WADDELL v. HARSHAW.

which were made a charge upon the premises in respect of which same were incurred, and it was held that such expenses became a charge on the premises upon the completion of the works, and that the period of limitation in respect of such charge began to run from that date.

Lord Esher, M.R., says (p. 5):—"In this case an action was brought by a local board to enforce against the present owners of certain property a charge imposed upon such property in respect of certain works of paving which had been done by the plaintiffs. The defence set up by the defendants is that the claim of the plaintiffs is barred by the Statute of Limitations. We have, in dealing with the question so raised, to consider what is the true construction of two enactments. The first question that arises is the question when under the 21 & 22 Vict. c. 98, s. 62, the charge is imposed on the premises. That point was really decided in the case of *Tottenham Local Board* v. *Rowell* (1), a decision which was afterwards followed by North, J., in the case of *In re Bettesworth and Richer* (2). It was there held that the charge is imposed as soon as the works are completed. In that case we applied the rule of construction, upon which we have acted in so many cases, viz., that an Act of Parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject-matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed. The result is that the charge in the present case was imposed in 1875 when the works were completed. The action was not brought within twelve years from that time. Then comes the question, What is the construction of the Statute of Limitations upon which reliance was placed, viz. 37 & 38 Vict. c. 57, s. 8? We must apply to that enactment the canon of construction to which I have already alluded." He refers to the section and says:—"It was strongly argued that the words 'present right to receive the same,' in this section, are equivalent to 'present right to enforce payment of the same.' If there were some overwhelming reason why that construction should be given to the words, if that were the

(1) 15 Ch. D. 378. (2) 37 Ch. D. 535.

only construction that would render the procedure sensible, I think possibly the words might receive that construction; but I do not think it would be their ordinary meaning in the English language. A present right to receive is not in ordinary English the same as a present right to enforce payment. Then, is there any overwhelming reason why we should read the words otherwise than in their natural sense? So far from that, I think that in the present case to read the words in the way suggested for the plaintiffs would raise insuperable difficulties, whereas to read them in their natural sense makes the whole legislation sensible, and easy of application. The difficulty that arises on the plaintiffs' construction has been pointed out, viz. that the board, who have to receive the money, and also to apportion the amount, would have the power to delay the application of the Statute of Limitations for any time they pleased. When that difficulty was presented, the plaintiffs' counsel endeavoured to meet it by the ingenious suggestion that if the apportionment were not made within a reasonable time, the making of it might be enforced by mandamus; and other modes were suggested of meeting the difficulty. But why should we embark on such questions, and invent means of overcoming this difficulty, when by reading the words in their ordinary sense, no such difficulty arises. The charge exists, though the exact amount charged may not be ascertained. It is suggested that a person in whose favour a charge is imposed cannot be entitled to receive an amount which is not ascertained. I do not see why this should be so. A sum may be offered to him, which the person offering it thinks to be the right sum, and which he may also think to be the right sum, although the actual calculation of the exact amount has not been made. What is there in law, or reason, or business, to show that he is not entitled to receive the sum when so offered to him? I cannot see any difficulty in saying that there is a present right to receive the expenses. In the case where a person has only a reversionary right to receive money, or for some other reason the time when he is entitled to receive the money has not yet arrived, it would be different, and there would be no present right to receive the money. Then there must by the section be a present right to receive the money, which has 'accrued to some

M. R. 1905.

WADDELL v. HARSHAW.

person capable of giving a discharge for or release of the same.' . . . So reading the words of the section in their ordinary sense, it seems to me that in the present case the local board were a body of persons in whose favour a charge existed for a sum of money, who were entitled to receive it, and who were capable of giving a receipt or discharge for it, although there had not yet been an apportionment of the exact amount. They were entitled to receive a sum offered to them, if they thought it to be the right sum, and they were not under any incapacity disabling them from giving a discharge to the person paying such sum of money. It seems to me, therefore, that the case comes within the words of the section read in their ordinary sense, and that there is no reason for giving them any other construction." The judgment, when considered, appears defective in bearing on the case before me, inasmuch as it does not state—and it was not necessary for the decision in the case that it should state—what was the precise meaning of "present right to receive."

Lindley, L. J., refers also to the true construction of the statute, and says:—"It was early pointed out when those words, 'present right to receive,' were discussed that the language there used was different from, and apparently used in contrast to, the expression in s. 2 of 3 & 4 Wm. 4, c. 27, which spoke of the right of action first accruing. The two expressions are used in the same Act, and apparently do not mean the same thing. The expression 'present right to receive' is a little ambiguous, and in considering what construction it is proper to put upon it, we must look a little at the object of the Act, and the consequences of the rival constructions respectively." "Who ever heard," he says again, "with reference to any Statute of Limitations, that a creditor could enlarge the time for suing indefinitely by omitting to do that which it is his duty by statute or common law to do? It appears to me that we ought not to adopt a construction of the statute that leads to such a result unless we are driven to it. When one looks a little more closely at the 8th section, I think it will be clearly seen what is meant by it. The section is dealing with charges on land" (so in the main it is, and that observation shows that the question of a legacy was not before the mind of Lindley, L.J.),

"and it must be borne in mind that such charges are present charges and future charges, reversionary charges, charges in remainder, and such like. One general form of expression is used to include the whole, and that expression is, 'present right to receive.' It seems to me clear that the meaning is that in each case the moment to be looked to is the moment when the charge comes into present operation; for instance, when reversionary charges are being dealt with, the moment to be looked to is the moment when the reversion falls in and the charge takes effect in possession. With regard to the other expression contained in the section, viz., 'capable of giving a discharge, &c.,' that seems to have been inserted to meet the case where a person is not legally capable of giving a discharge." He refers to *Tottenham Local Board* v. *Rowell* (1), and *In re Bettesworth and Richer* (2). And he says, "I know of no decided case under the old Statute of Limitations that is inconsistent with the view we take. In the case of *Earle* v. *Bellingham* (3), where Romilly, M.R., held, and very properly held, that the time for computing interest on a legacy ran from a particular date, there are, no doubt, some observations which seem to show that he was of opinion that the time from which such interest ran was necessarily the same as that referred to in the Statute of Limitations; and he does appear to have thrown out an intimation that in the case of a legacy the Statute of Limitations does not begin to run till twelve months after the death of the testator. That was, however, merely an *obiter dictum*, and I doubt whether that view was correct. Be that as it may, we have now to consider the application of the Statute of Limitations to a charge created under the Public Health Act. I think the view taken by the Divisional Court was correct, and that a present right to receive the amount of the charge did accrue within the meaning of the Real Property Limitation Act, at the time when the works were completed."

Now there is, no doubt, in that case a determination that a "present right to receive" is not the same as a "present right to sue for" a charge upon lands; and the decision in the case, if I

(1) 15 Ch. D. 378. (2) 37 Ch. D. 535. (3) 24 Beav. 448.

M. R. 1905. WADDELL *v.* HARSHAW.

may respectfully say so, is in accordance with sound sense. But the question is whether it applies to a legacy as well as to a drainage charge. That in terms it does not—as matter of decision—is plain from the passage I have read from the judgment of Lindley, L.J., dealing with *Earle* v. *Bellingham* (1), where his Lordship says he doubts whether that decision on this point is correct. It may be said that that expression is only a judicial *façon de parler*, equivalent to a statement that Lord Romilly was wrong. I cannot so treat it: and I think that had this question arisen immediately afterwards in the Court of Appeal, as it has now arisen here, in reference to a legacy, their Lordships would have felt bound to hear the point argued.

It is to be observed that though all three Judges of the Court of Appeal pointed out that the words "present right to receive" are, in reference to a drainage charge, not the same as a "present right to sue" for the money due under it, they nowhere state what exactly is the correct meaning of the former phrase, unless Lindley, L.J., has done so in the passage I have read. The charge attached immediately on the completion of the drainage works. It could be enforced at once, as a charge, by appropriate legal measures. It belonged to the plaintiffs. The ascertainment of the exact apportioned amount is mere machinery. A tape-line measurement of frontage would fix it by a sum in arithmetic, the whole charge being ascertained. By not taking the proper steps to assess the amount chargeable on the particular tenement, the plaintiffs could (if their argument was right) indefinitely postpone the operation of any Statute of Limitations, their neglect thus operating in their own favour.

I cannot read that case as governing the question before me, where the plaintiff only says, "my claim could not be prosecuted till a year from the death of the testator."

The Statutes of Limitations do not in terms anywhere state, so far as I can find, that their bar is founded upon a presumption of *laches*. It has been said that they go on the presumption of payment. That is, however, nowhere stated in them. But even if the presumption be one of payment, there could be no pre-

(1) 24 Beav. 448.

sumption of payment of a legacy before the end of the first year; and this presumption itself may well be founded upon an assumed neglect to sue. There can, however, be no neglect to sue till a suit is possible; and while in the case of a drainage charge the possibility existed *instanter* on the execution of the works, there is, in the absence of some extraordinary circumstances, such as making away with assets or the like, no such possibility in the case of a legacy, as to which our law draws its principles in this respect from the civilians; and even if a legatee has a right to restrain a *devastavit* during the year, he may, nevertheless, have no right to the legacy, which will depend on the state of the assets when realised. Of course a legacy is not a charge upon the residue; for the executor may sell all the assets without regard to it, and a purchaser from him, even with notice of legacies unpaid, incurs no liability to the legatees. This shows the complete distinction between the present case, and one where a charge is fastened upon the land by the Public Health Act.

Thus I hold that the present point, though it has been the subject of judicial observation and *dicta*, is not covered by any decision; and I feel myself bound to decide in accordance with my own opinion on the words of the statutes. Where there is a present right to receive a drainage charge, actually fixed upon the land, and vested in the person suing for it, the words of the statute are complied with. Here this is not the case.

I think the plaintiffs' claim is not barred, and there must be a decree for the administration of the estate.

I hope I need not say that if I thought that the Court of Appeal in *The Hornsey Case* (1) had in effect decided this point, I should as of course have followed that decision.

I may add that my opinion in regard to the question before me seems to be in accordance with that expressed by the learned editors of Darby and Bosanquet on the Statutes of Limitations, and I think of some other text-writers on the subject.

R. W. L.

(1) 24 Q. B. D. 1.

Appeal. 1905.

WADDELL v. HARSHAW.

May 15, 18.

The defendants appealed (1).

S. L. Brown, K.C., and *F. N. Greer*, for the appellants :—

In the case of a legacy, the right to the legacy arises on the death of the testator, though the legatee cannot insist on payment until one year after the death : *Re Owen* (2). "Present right to receive" means the right to receive, as distinguished from the right to recover : *Hornsey Local Board* v. *Monarch Investment Building Society* (3). The decision in that case governs the present ; and the *dictum* in *Earle* v. *Bellingham* (4) must be considered to be overruled.

Gordon, K.C., and *M'Ilroy*, for the respondents :—

Down to the decision in *The Hornsey Case* (3) the authorities were absolutely clear on the point that the right of the legatee was not barred until thirteen years from the death of the testator. *Earle* v. *Bellingham* (4) was a decision of Lord Romilly. It was followed by Chitty, J., in *Sly* v. *Blake* (5). *The Hornsey Case* (3) does not apply ; that was a decision under the Public Health Act as to improvement expenses, under the provisions of a special Act of Parliament. Present right to a legacy is different from a present right to receive payment. A legacy is not a charge on the assets. The personal representative has always one year from the death to collect the assets and pay the debts, although an administration action may be brought, and a decree obtained, by a legatee, or one of the next-of-kin, before the year has elapsed : *Wallis* v. *Wallis* (6).

May 18.

FITZ GIBBON, L.J. :—

This action was brought for the recovery of three legacies, and the only defence alleged is the Statute of Limitations. The Master of the Rolls has held that, on a claim for a legacy, the statute begins to run, not from the death of the testator, but from

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ.

(2) [1894] 3 Ch. 220.

(3) 24 Q. B. D. 1.

(4) 24 Beav. 448.

(5) 29 Ch. D. 964.

(6) 9 L. R. Ir. 511.

the expiration of one year after his death, that being the date at which a legatee becomes entitled to enforce payment. We have the decision of the English Court of Appeal in *The Hornsey Local Board* v. *Monarch Investment Building Society* (1) upon the same section, not as to a legacy, but as to money charged on land. In that case a local authority had under the Public Health Act, 1848, section 69, incurred paving expenses, which, by the Local Government Act, 1858, section 52, were charged on the premises in respect of which they were incurred, and it was held that a present right to receive such expenses accrued when they became a charge upon the completion of the works, and that the period of limitation under the Real Property Limitation Act, 1874, section 8, began to run from that date, and not from the date of the apportionment of the expenses among the frontagers, on which they, for the first time, became recoverable. Lindley, L.J., said:—

> "If we read 'present right to receive' as distinguishable, as apparently it is meant to be, from 'present right to sue,' everything works out harmoniously; the moment the time of the coming into existence of the charge is ascertained, the period of limitation will begin to run, whereas, if the opposite construction is adopted, we are at once landed in the curious anomaly that the creditor—that is to say, the person who is entitled to the charge—can, by his own act, postpone his right to sue indefinitely."

This is a decision of a co-ordinate Court, affirming the judgment of the King's Bench; and even if I differed from it, I should not set up my own opinion against it, being a decision on an important Act of Parliament, which ought to receive the same construction in the two countries.

The "present right to receive" the charge in *The Hornsey Case* (1) was held to be something different from the present right to sue for the money. If there be any distinction in this respect as to the right to receive a legacy, the latter is more complete than the right in *The Hornsey Case* (1), because no frontager's liability was ascertained until apportionment. According to the popular understanding of language, when a testator who has given a legacy dies, and his will is proved, the probate relates back to

(1) 24 Q. B. D. 1.

Appeal. 1905.

WADDELL v. HARSHAW.

Fitz Gibbon, L.J.

the date of his death, and the legacy becomes payable. Though the executor may with-hold the payment for a year, and the statute in terms directs that it shall be not made for a year, the object of the delay is to give time to realise the assets, and to ascertain the claims against them, and earlier payment may be made, and usually is made, the executor taking the risk of prior claims turning up. But is there not "a right to receive" the legacy? The precise anomaly mentioned by Lord Lindley would not arise, but other complications may be suggested. When would the statute begin to run in the case of a legacy vesting at twenty-one, but not to be paid until the legatee attained twenty-five? Many causes for postponement of the actual receipt of legacies may co-exist with an indefeasible and present right to them. On the other hand, could it be held that a widow had no "present right to receive" a legacy which her husband directed his executor to pay within a month after his death? Yet the executor could not be compelled to pay it until he had at least ascertained that the estate was solvent, and that the money in hand was not required to pay debts. In my opinion, fortified by the decision in *The Hornsey Case* (1), the right to receive a legacy when the will is proved accrues from the death of the testator, and not from one year later. The opposite construction would lead to the conclusion that the claim to a legacy directed to be paid forthwith would not be barred for thirteen years from the testator's death.

For these reasons, I am unable to concur with the Master of the Rolls; and as the defence of the Statute of Limitations is a plea in bar, and there is no other defence in this case, the action must be dismissed with costs.

WALKER, L.J.:—

The question in this case is whether a "present right to receive" the legacy within the meaning of the Act of 1874, sect. 8, accrued on the death of the testator, or only on the expiration of twelve months after the death. If the latter be the event, the right is not barred, and the Master of the Rolls has so held.

(1) 24 Q. B. D. 1.

There is no decision in favour of this view, but there is a *dictum* of Lord Romilly in *Earle* v. *Bellingham* (1) which supports it. He says:—"Time runs from the period at which the right to receive the legacy accrued. The right to a legacy, and the right to receive it, is quite a different thing. The right to a legacy ordinarily accrues on the death of the testator; but the right to receive it does not arise until twelve months after his death." The decision in the case, that interest on the legacies did not run till they became payable by the reversion falling in, was of course right; and the *dictum* introducing the element of twelve months was not necessary for the decision. In the case of *Re Johnson* (2) a period of more than twenty-one years had passed since the death of the intestate, and the right to a general administration at the suit of the next-of-kin was in any event barred. Mr. Justice Chitty, after referring to a bar of twenty years, does say, "or at all events twenty-one years, the additional year being conceded in conformity with the general rule, that an executor or administrator is allowed in an administration case one year to complete the administration"; and he adopts the statement of Lord Romilly, that the right to a legacy, and the right to receive a legacy, are distinct.

Re Owen (3) does not help the respondents, but rather the contrary, as Stirling, J., held that the words "present right to receive" are to be read according to their ordinary meaning in the English language, for which he cites with approbation *Hornsey Local Board* v. *Monarch Investment and Building Society* (4). I am unable to distinguish that case in principle from the present. It is expressly laid down there that the words "present right to receive" are not the same as "present right to enforce payment," and that in the absence of overwhelming reason to the contrary, the words "present right to receive" should receive their natural signification in the English language. Therefore the Court, consisting of Lord Esher, Lord Justice Lindley, and Lord Justice Lopes, held that the section applied and barred the right; though the charge created by the Public Health Act was not ascertained in money at this date, it was

(1) 24 Beav. 448.
(2) 29 Ch. D. 964.
(3) [1894] 3 Ch. 220.
(4) 24 Q. B. D. 1.

Appeal. 1905.

WADDELL v. HARSHAW.

Walker, L.J.

treated to have accrued, and though it could not be recovered in fact if resisted for a period of three months after apportionment.

They held the parties might agree on the amount to be taken, and might dispense with objections to the apportionment, and therefore the words "present right to receive" were satisfied. So here the legatee might of course take the legacy within the twelve months, and the executor might, if he chose, pay. Therefore, there was a present right to take and receive as distinguished from a right to enforce. They also distinguished the case from one where a person has only a reversionary right to receive money, or for some other reason the time when he is entitled to receive the money has not arrived, for there would be then no present right to receive. Lord Justice Lindley refers to *Earle* v. *Bellingham* (1), and intimates plainly his opinion that the *dictum* of Lord Romilly was not correct. In my opinion that decision of the Court of Appeal governs in principle the present case. It is the latest in date and highest in authority, and I think we ought to follow it.

The difference in language between section 1 and section 8 of the Act of 1874 was also relied on, and is worth noting.

The Master of the Rolls says in his judgment in this case, after referring at length to the case in 24 Q. B. Div., that, notwithstanding that decision, if the question of a legacy being barred after twelve years from the death had arisen before the same Court of Appeal, they would have heard the question argued, inasmuch as the decision was in reference to a charge, and not a legacy. So far I agree, but I also think they would have held that the principle of their own decision applied, and must have done so.

I rest my view upon the authority of the case in 24 Q. B. Div., which, I may add, seems to me the more correct exposition of the statute.

(1) 24 Beav. 448.

HOLMES, L.J. :—

If this case had been argued before me without the assistance given by *Hornsey Local Board* v. *Monarch Investment Building Society* (1), I am not quite sure how I should have decided it. I have little doubt that if I had been asked at any time of my legal career to name the period of limitation in the case of ordinary legacies, I should have answered off-hand twenty years from the death of the testator before the Act of 1874 came into operation, and twelve years subsequently. It would not have occurred to me to add a year, in consequence of the rule adopted by analogy to the civil law for the convenience of administration of estates, which enables the executor, if he so desires, to withhold payment during the year following the testator's death. It is, however, possible that I might have been induced to alter my first impression on this point by *Earle* v. *Bellingham* (2), and the arguments suggested thereby. I am now relieved from difficulty by *Hornsey Local Board* v. *Monarch Investment Building Society* (1)—a decision under the same section of the Act of 1874 that deals with legacies. It is there held that a present right to receive is not equivalent to a present right to enforce payment.

That case cannot be distinguished from the present, and even if my own mind was not free from doubt, I should feel that on a question of this kind I ought to follow the judgment of the English Court of Appeal, given fifteen years ago, and not questioned since.

Solicitor for the plaintiff: *William M'Keown.*
Solicitor for the defendant: *R. S. Heron.*

R. D. M.

(1) 24 Q. B. D. 1. (2) 24 Beav. 448.

Barton, J.
1905.
June 14–16.
July 3.

CALDWELL *v.* KILKELLY.

(1904. No. 1051.)

Landlord and tenant—Sporting rights—Exclusive right of fishing—Judicial tenant—Landlord's right of entry—Right incidental thereto—Injunction.

A landlord entitled to the exclusive right of fishing, and to a right of entry for that purpose, under section 5 of the Land Law (Ireland) Act, 1881, in a portion of a river adjoining a judicial tenant's holding, the bank and bed of which, *ad medium filum aquæ*, form part of the holding, has, as incidental thereto, the right of doing all things necessary for the use of his right of fishing and entry; but he cannot claim anything in the nature of an enlargement or extension of such right.

Where a landlord entitled to the exclusive right of fishing in a river forming part of the holding of a judicial tenant, as above mentioned, claimed a right to enter upon the lands of such tenant for the purpose of—(1) piling and embanking part of the bank of the river, and making a path for fishermen on the embankment; (2) placing stones and rocks in the bed of the river for shelter for salmon; and (3) cutting and keeping down weeds in the bed of the river:—

Held, that the landlord's claim failed as to (1) and (2).

Held, also, as to (3), that the landlord, under the circumstances of the present case, had a right of entry for the purpose of cutting and keeping down useless and injurious weeds.

TRIAL OF ACTION.

The plaintiff in this action was the landlord, and the defendant, John Kilkelly, was the tenant, of a farm of land known as "New Grange" in the county of Meath, which adjoined the river Boyne.

By an order of a Sub-Commission of the Irish Land Commission, dated 7th April, 1903, the fair rent of the farm was fixed at the sum of £397 12*s.* 6*d.*, and by the same order the exclusive right of sporting (including the right of fishing) was reserved to the plaintiff. By an order of the Irish Land Commission said order was varied by the rent of said farm being fixed at £424 10*s.* instead of the aforesaid sum of £397 12*s.* 6*d.*, but otherwise said

order of the Sub-Commission was affirmed. By this order the bank and bed of the river *ad medium filum* were found to be vested in the defendant.

The plaintiff averred in the statement of claim that at the time of the acts thereinafter complained of the river, where it abutted on or adjoined defendant's holding, was choked with weeds; that the bank of the river on defendant's side was for the most part in a very bad and neglected condition; and, furthermore, that the portion of the holding immediately adjoining the river was in parts marshy, wet, and overgrown with flaggers and weeds; that consequently it was impossible for the plaintiff to properly (or in fact at all in some places) exercise the fishing rights reserved by the said order of the 7th April, 1903.

The plaintiff further averred that shortly after the making of the said order he informed the defendant that he proposed going upon the holding with his workmen for the purpose of doing such acts and executing such repairs in and about the said river and bank thereof as were necessary for the due and proper use and enjoyment of the said fishing right and fishing, at the same time undertaking in writing to pay to the said defendant reasonable compensation for any damage done to the defendant's lands by reason of the carrying out of these works; that subsequently he attended on the holding by his agents, servants, and workmen, for the purpose of doing such acts and executing such repairs as should be necessary for the due and proper use and enjoyment of plaintiff's fishing rights and fishing, and the preservation thereof, but that the defendant prevented the plaintiff from doing so.

The defendant in his defence averred that the value of his holding for farming purposes was considerably increased by the fact that the river Boyne extended for over a mile along one side of his holding, inasmuch as the cattle used the river both for drinking purposes and for standing in during the hot season, going across the river and running up and down it during the "fly" months; they being able to get in and out practically at any part adjoining the defendant's holding.

The defendant denied that the river, where it adjoined his holding, was choked with weeds, or that the bank of the said river adjoining his holding was in a bad or neglected condition, as

Barton, J.
1905.
CALDWELL
v.
KILKELLY.

alleged by plaintiff, no weeds being noticeable therein, save in the summer time. He averred that the bank had been for about sixty years in the same condition as it then was, *i.e.* practically level with the water, and that he and his predecessors in title for said period had enjoyed, among other rights, the right of having free ingress and egress for their cattle into and from the said river all along said bank. The defendant also alleged that the works proposed by plaintiff would seriously affect the use of defendant's holding as a farm. Prior to action brought, the defendant expressed his willingness to allow the plaintiff to enter his lands for the purpose of cutting the weeds, if the plaintiff gave his written undertaking not to do anything further than cut the weeds, and an admission that he did so by the defendant's permission, which the plaintiff declined to do.

The plaintiff claimed an injunction to restrain the defendant, his agents, servants, and workmen, from (1) preventing or otherwise interfering with the plaintiff in cutting weeds in the river Boyne, where it adjoined defendant's farm, so as to deprive the plaintiff of the free and proper use and enjoyment of the fishing rights over the said river, reserved to him by order of the Sub-Commission of the 7th April, 1903; (2) from preventing or otherwise interfering with the plaintiff in repairing the bed and banks of the said river, where it adjoined the said farm, so as to deprive the plaintiff of the free and proper use and enjoyment of said fishing rights; and (3) from preventing or otherwise interfering with the plaintiff in the execution of any other works in and about the said river, and the banks thereof, which might be necessary for the due and proper use and enjoyment of the said fishing rights and fishing.

The evidence given at the trial, so far as is material, is referred to fully in the judgment of Barton, J.

Henry, K.C., *Jellett, K.C.*, and *Chaytor*, for the plaintiff:—

Where the use of a thing is granted to a person, everything is granted which is necessary to enable the grantee to enjoy such use. Consequently, where a person has a shooting right, he is entitled to do all that is necessary to enable him to exercise his

right. For instance, where a person is entitled to a shooting right over a grouse moor, he is entitled to erect grouse "butts." [They cited *Liford's Case* (1); *Pomfret* v. *Ricroft* (2).]

The Solicitor-General, K.C., Ronan, K.C., Healy, K.C., and *Arthur Meredith*, for the defendant:—

The bank is at the present time in the same state as it has been for 100 years, and only the grass along its banks has been trampled down by cattle. If the banks were raised in the manner proposed by the plaintiff, the cattle might break their legs in trying to get to the river, especially in the "fly" season; and there is always the risk of cattle being injured by artificial structures being swept away by floods. The proposed alteration would thus depreciate the value of the farm as a grazing farm, for which purpose it has been used for the past fifty years, and also depreciate its selling value. Even the right of entry for exercising fishing rights is taken into account upon the fixing of the fair rent. That right only arose in 1903, and therefore no point can be made as to the stones removed from the bed of the river. They were removed twenty-five years previous to 1903, and the plaintiff acquiesced in their removal.

So long as the tenant acts reasonably in the management and use of his farm, the landlord must exercise his right of fishing over the holding in the state it may happen to be in from time to time. Here the tenant has not affirmatively done anything to obstruct the plaintiff; and, therefore, the case of *Boyle* v. *Holcroft* (3) has no application to the present case. Even material interruptions with sporting rights will be allowed if made *bona fide* in exercise of the right of agriculture: *Gearns* v. *Baker* (4); *Fetherstonhaugh* v. *Hagarty* (5). The silting up of the river arises from natural causes, and the plaintiff has no right to deprive the defendant of the additional land thereby created. What the plaintiff proposes to do would no doubt make his fishing right more valuable and its exercise more comfortable;

(1) 11 Rep. 52, a.
(2) 1 Wms. Saund. 322, b.
(3) [1905] 1 I. R. 245.
(4) L. R. 10 Ch. 355.
(5) 3 L. R. Ir. 150.

Barton, J. 1905. CALDWELL v. KILKELLY.

but he cannot claim a right to do that. Moreover, the rights claimed by the plaintiff are not defined. The plaintiff has the right of net-fishing in the half of the river opposite the defendant's holding; and if he put down stones in the bed of the river for the purpose of rod-fishing, which would interfere with net-fishing, could he also claim a right to remove them if he chose to exercise his right of net-fishing? There is no evidence offered as to the quantity of stones which plaintiff proposes to lay down in the river. It is therefore impossible to define the right claimed. As to the right to cut the weeds, that is a small matter; and prior to action brought, the defendant offered to allow the plaintiff to cut them. The plaintiff may, perhaps, have a right to do that: it is an arguable question; but this question is not the substantial part of the action.

Jellett, K.C., in reply :—

The injunction should be confined to rod-fishing, which is all the plaintiff asks; and thus all questions relating to other rights will remain untouched. All that is sought here is to establish the right to do what is necessary to enable plaintiff to exercise the right of fishing at all. Where a person has a right over land, he is entitled to do whatever is necessary for the reasonable exercise of his right. See Goddard on Easements, 6th ed., 377, and the same principle applies to a *profit à prendre*: *Goodhart* v. *Hyett* (1). Here the evidence shows that unless the proposed works are carried out, the plaintiff's right cannot be exercised at all. Of course the right of the plaintiff is subject to limitations. He cannot say capriciously that something will improve his fishing and insist on doing it, nor can he interfere with the ordinary use of the farm; but what is proposed to be done does not fall within these limitations. The defendant cannot be allowed to insist on what would annihilate the *profit à prendre*. See the judgment of the Master of the Rolls in *Fetherstonhaugh* v. *Hagarty* (2), at page 159.

(1) 25 Ch. D. 182. (2) 3 L. R. Ir. 150.

Barton, J.
1905.
CALDWELL
v.
KILKELLY.
July 3.

BARTON, J.:—

The defendant is judicial tenant to the plaintiff of a large and valuable grazing farm, which extends for over a mile along one bank of the river Boyne. The farm was formerly held under a lease for a term of years, under which the lessor had a right of fishing concurrently with the lessee. Defendant bought the lessee's interest for a sum of upwards of £8700, and afterwards applied to have a fair rent fixed. A Sub-Commission in 1903 fixed a fair rent at £327 12*s.* 6*d.* The Land Commission raised the rent to £424 10*s.*; but otherwise affirmed the order of the Sub-Commission. There was then an appeal on a question of law to the Court of Appeal, which was dismissed. The order fixing the fair rent certified that the landlord, at the hearing, required that the right of sporting, as mentioned in section 5 of the Land Act of 1881, should belong exclusively to him. The effect of that order was that from that date, as between landlord and tenant, an exclusive right was acquired by the landlord of fishing and taking fish within the ambit of the tenant's holding in substitution for the mere concurrent right which he previously enjoyed. In addition to this exclusive right of fishing and taking fish, the landlord, at the same time, acquired the right given by section 5 of the Act of 1881, by which "he or any person or persons authorised by him in that behalf (he or they making reasonable amends and satisfaction for any damage to be done or occasioned thereby) shall have the right to enter upon the holding for any of the purposes following," which purposes included fishing or taking fish. Accordingly, the landlord acquired in 1903—very much as if it had been reserved by him in a lease of that date, or (in other words) regranted by the tenant to him by a deed of that date—an exclusive right of fishing and taking fish within the ambit of the holding, with a right of entry on the holding for that purpose.

It is important to note that the tenant's holding includes not only the bank of the river, but also the bed *ad medium filum aquæ*. This appears from the schedule of particulars to the fair rent order, commonly called the "Pink Paper," and from the assessor's report to the Land Commission. In the former document the particulars of the holding include "River, half of Boyne, 13A. 3R.; in the latter document the area is corrected to 12A. 1R.

Barton, J. 1905. CALDWELL v. KILKELLY.

Accordingly, we are not troubled in this case with any question as to the title to the bed of the river such as arose in *Hanbury* v. *Jenkins* (1), or as to the boundaries between the bank and bed such as arose in *Hindson* v. *Ashby* (2). The defendant, as tenant, is entitled to the possession of the bank and bed at this place, and the plaintiff's right is to fish in the waters which are included in the holding, and to take fish from the bed of the river or from the water flowing over it, and to enter upon the lands for these purposes. Incidentally, he has also the subsidiary or ancillary right to do all things necessary for the use of the right of fishing and entry which he has thus acquired. The present case is concerned with the extent of such subsidiary or ancillary rights. It appears that this river has for many years been fished at this spot with nets; but the right of fishing admittedly includes the right to fish by rod from the bank. Accordingly, he has, in my opinion, a right of access to and user of the bank. But the plaintiff claims much more than this; he wishes to render this part of the river more suitable for rod-fishing. For that purpose he claims a right to execute certain works and do certain things upon the bank and in the bed of the river. These works and operations fall under three heads, viz. (1) piling and embanking part of the bank and making a path for fishermen on the embankment; (2) placing stones and rocks in the bed of the river for shelter for salmon; and (3) cutting and keeping down weeds in the bed of the river. These works would facilitate rod-fishing and render the fishing right more valuable. The main question in the case seems to be whether the right to execute all or any of these works, and to do all or any of these things, is necessarily incidental to his right of fishing and taking fish and entering upon the lands for that purpose.

In the first place, the plaintiff claims a right to clear and pile a considerable part of the river frontage so as to make a firm embankment with a path for rod-fishermen to pass to and fro, and up and down, with ease and comfort. It is alleged that a necessity has arisen for some work of this kind for the following reason:— It appears that, partly as the result of the currents caused by the

(1) [1901] 2 Ch. 401. (2) [1896] 1 Ch. 78; [1896] 2 Ch. 1.

winding course of the river, there has been a gradual silting of soft ground alluvially deposited along the river bank. The process has been natural and stealthy, such as would escape the observation of anyone who might not be directly interested in watching for many years and from year to year the condition of the bank. The present condition is that, to the extent in some places of 15 or 16 feet, this alluvial deposit forms a sort of strip in the nature of a secondary bank or shelf or shore which may be more or less covered by water at certain times when the river is full, but is said to be usually uncovered when the river is normal. The strip is soft, and, in some places, muddy. That is its natural condition, not materially affected by any trampling of cattle or any disrepair. The evidence of the witnesses varies very much as to the degree of its wetness and swampiness. This may be partly accounted for by the difference in their several points of view—plaintiff's witnesses being mostly fishermen, and defendant's witnesses mostly graziers—also by the difference in their several opportunities and powers of observation; and, lastly, by differences in the conditions of weather from time to time, or in the nature of the ground here and there. This shelf of wet ground undoubtedly causes difficulties and inconveniences to a rod-fisherman. In addition to the plaintiff and his servants, there were three gentlemen — Messrs. Osborne, Jameson, and Watkins—all experienced fishermen and excellent witnesses, who deposed to these difficulties and inconveniences. Mr. Osborne, the oldest and most experienced of them, refused to go further than to say that the present condition of affairs interfered with comfortable fishing. Mr. Jameson was of opinion that under present conditions fishing must in some places be nearly impossible in wet weather. Mr. Watkins held a stronger view, and was of opinion that in one place at all events it would be absolutely impossible to fish without draining the bog. I infer that this swampy shelf of shore is a great inconvenience to a rod-fisherman; and that in a part or parts of it a fisherman, at a critical moment in playing or gaffing, would be very likely to lose a fish. But the question arises whether, if this swampy strip of ground was one of the natural and existing difficulties and drawbacks of the bank at the date of the grant, the grantee must not take the bank substantially in its then condition for better and for worse.

Barton, J. 1905. CALDWELL v. KILKELLY.

The plaintiff proposes to remove a foot or two of this swampy strip, to construct an embankment from 2 to 4 feet high, with a slope to the bed of the river at an angle of 45 degrees, to make on top of the embankment a path for fishermen 3 feet wide, to throw the removed mud to the back of this path, and to level and drain the space between the path and the solid ground. These operations would extend along about one-half of the river frontage of defendant's farm. They would undoubtedly effect an improvement from the rod-fisherman's point of view, and would enable plaintiff to get a better rent from a lessee of the fishing right; but I cannot doubt that they would involve an injury to the defendant. I have no doubt that free access for cattle along the bank, to and from, and up and down, the river, is one of the principal amenities of the farm as a grazing farm, and was a substantial element in the fixing of the fair rent. In the hot months when the flies attack the cattle, they run rapidly in and out of, and up and down, the river, and this embankment would be a serious obstacle and source of risk to them. A competent valuer was examined as a witness on behalf of the defendant, and gave it as his opinion that if the embankment were erected the rent should be reduced to £80 a year. It is suggested that, if any loss of that kind resulted to the defendant, it would be a proper subject of compensation under the provisions in section 5 of the Act of 1881, which is to the effect that the landlord is to make reasonable amends and satisfaction for damage done or occasioned by the exercise of his right to enter on the lands for fishing. It is unnecessary to discuss the suggestion, because in the present case there is the preliminary question—whether this alleged right to make the artificial bank and path is incidental to, and included in, the right of fishing. In my opinion it is not; and that being so, no question as to compensation can arise.

Plaintiff's counsel have relied upon a class of case of which *Liford's Case* (1) and *Pomfret* v. *Ricroft* (2) are classic types. Cases of that kind illustrate the familiar principle to which I have already referred, that when the use of a thing is granted, everything is granted which is necessary to enable the grantee to have

(1) 11 Rep. 52, a. (2) 1 Wms. Saund. 322, b.

and enjoy such use. Regard must be had in applying that principle to the exact nature of the thing, the use of which was granted. For example, if it be drinking-water, the right to make it and keep it pure and potable passes with the right to use it. If it be an ordinary right of way, the right to repair it may pass. If it be a "roadway" or "carriage-way," the right to make and keep the way in a condition fit for the burden of roadwork or carriage-work is implied. If it be a right of mining and taking minerals, there is authority for saying that a right may pass of erecting suitable machinery for raising, and even of laying rails for removing, the minerals. It may be that some cases of the kind to which I have last referred have suggested this claim which the plaintiff has put forward of making an artificial embankment; but a right to fish and to enter for that purpose differs essentially from rights to a "roadway" or a "carriage-way," which are rights involving the necessity of special works of preparation and of maintenance, or from a right of mining, which obviously requires machinery, etc., for its use.

It is true that the right of fishing is a *profit à prendre*, and the owner of it may make all the profit he can out of it. It is true that he gets with it a right to everything necessary for its enjoyment, *e.g.* access to the river; and where it is a proper way of fishing the river, user of the banks and bed. Furthermore, I could imagine circumstances under which he might claim the right to repair the bank. I express no opinion as to any claim of that kind, which can be dealt with if it arises. But I am unable to accede to the suggestion that an artificial path should be regarded as necessary to enable a rod-fisherman to fish a river. Must not a fisherman, as a general rule, surmount the natural or existing difficulties of the bank and bed of the river by his skill and resourcefulness? Is not the pitting of human skill and resourcefulness against the difficulties of the bed and bank of the river one of the characteristics which has always given to fishing, whether it be regarded as a pursuit or as a sport, its peculiar zest, excitement, and fascination? This distinctive feature of fishing, both as a pursuit and as a sport, cannot be left out of sight, when we are asked to read into this "statutory contract" special rights

Barton, J. 1905. CALDWELL v. KILKELLY.

and obligations which are not expressed in the statute or in the contract, and are not supported by any authority to be found in the books. So long as the owner of the river-bank keeps it in his own hands, he can, of course, subject to his obligations to other riparian proprietors, improve it for fishing purposes, by embanking it and rendering it easy and comfortable. But if the owner lets the bank and bed of the river to a farmer at a rent, what reason or authority can be suggested in support of a claim to raise an artificial embankment, which would render fishing more easy, but would be injurious to the tenant's rights under his contract of tenancy? Such a thing might be done by arrangement between them; and it is possible that the draining of this swampy place by arrangement between the parties may afford a reasonable solution of this controversy. But, as between landlord and statutory tenant, the landlord cannot claim the right to make an embankment or path of this kind in the absence of some special agreement or stipulation to that effect.

The validity of this claim may be tested by reference to some of the other obvious drawbacks and difficulties, which may be found in other rivers the subject of these statutory fishing rights. Some rivers have high banks from which it is impossible to gaff a fish. Some have shallow reedy shores, where it may require some skill and care to cast to the water beyond. Some rivers have willows here and there in the bank. Some rivers flow through natural woods or forest with overhanging trees, which render casting difficult or impossible, and necessitate resort to a boat or to some other expedient. Some rivers are, from their width, or on account of some other characteristic, incapable of being fished except from a boat; others for some reason or other cannot, in parts at all events, be fished except by wading. Can it be contended that, when a fair rent has been fixed upon a riverside-farm, and the exclusive right of fishing reserved to the landlord by the same order, the landlord thereby incidentally acquires the right to artificially remove all such natural difficulties of the bank and bed? I do not say that some special rights of that kind may not be established in some particular case, as arising out of the special circumstances of the case, *e.g.* the necessity for getting access to the river, or as arising out of some

special agreement between the parties, or out of some conduct of the tenant, which may have caused the bank to be in a bad condition. But, as a general rule, must not the grantee exercise his right over bed and bank, in the condition in which they were when the right of fishing was granted? In my opinion, that is, as a general rule, in a case of this kind the measure of his right.

In the second place, the plaintiff claims a right to put a number of stones or rocks, some of which are to be a ton in weight, in the bed of the river, so as to afford shelter for salmon. The evidence is to the effect that this would improve the river for rod-fishing, as the chances of catching passing fish are comparatively small, unless they can be enticed to sojourn in the water of the fishery by some sheltering rocks or stones. The defendant objects, because these stones or rocks would obstruct the free use of the river for his cattle, and in some cases would entail risk of injury to the cattle. The question is, whether the plaintiff can insist upon placing these obstructions in the bed of the river, or whether, if it can be done at all, it must not be by agreement, or arrangement, with defendant. As regards the right of plaintiff and defendant, *inter se*, in respect of the bed of the river, I have already pointed out that it appears from the orders of the Land Commission that the defendant is entitled to the possession of the bed of the river. He has been in constant occupation of it by means of his cattle; and I have no doubt that the free access to and from, and up and down, the river for his cattle was a material element in the fixing of the amount of the fair rent on these riverside-lands. Accordingly, the landlord's exclusive right of fishing does not, in my opinion, carry the right to the possession of the bed of the river; and he cannot, in the absence of some agreement, expressed or implied, justify placing these stones and rocks in the bed against defendant's will. It appears that some twenty-five years ago defendant's predecessor in title removed some stones in order to facilitate net-fishing; but nobody can say where exactly they were, and it is not suggested that plaintiff's right is to restore the bed to the condition in which it was twenty-five years ago. His right, if any, is grounded upon the acquisition of the exclusive right of

Barton, J. 1905. CALDWELL v. KILKELLY.

fishing in 1903. If he has a right to place these rocks in the bed, he would appear to have an equal right to remove them from time to time, according to his changing views and requirements. To place these stones and rocks in the bed of the river might improve the fishery, and make the right of fishing a more valuable right than was granted. But to do so would cast an increased burden upon, and would, *prima facie*, be a trespass upon defendant's holding. It would, in my opinion, involve an enlargement rather than a necessary incident of the right that was granted. I may point out in passing that the placing of obstructions *in alveo rivi* may, as regards neighbouring and opposite proprietors, be a serious matter. No authority has been cited in support of the suggestion that a right of that serious kind would pass, without mention and as a matter of course, with the grant of a *profit à prendre* of this kind; and I can see nothing that would justify me in holding that, in the present case, a right to place these obstructions *in alveo* passed, as between landlord and tenant, by implication with this right of fishing and taking fish.

There remains the question of cutting and keeping down weeds. It is not necessary for me to discuss that question, because in this particular case the defendant at the trial, through his counsel, raised no objection to the exercise of such a right. The weeds injure the fishing, and are of no benefit to defendant. Indeed, he had offered, before action was brought, to permit the weeds to be cut without admitting the plaintiff's right to do so. A right to cut and keep down useless and injurious weeds seems analogous to a right to repair a right of way, or to keep in a potable condition water which is to be used for drinking purposes. I do not, however, wish to be understood as laying it down that every owner of a fishing right of this kind can go in and cut weeds in every part of every river. Other cases may have to be considered upon their own facts. In the present case the right is not disputed, and the question has not been argued, and does not call for any further discussion by me.

Boyle v. *Holcroft* (1), recently before this Court, was cited in

(1) [1905] 1 I. R. 245.

argument; but it was a different case from the present one. That was a case of an unjustifiable obstruction by the tenant of the landlord's fishing right. I granted an injunction; and this Court will always protect the landlord from any unjustifiable obstruction of that kind. In that case the tenant attempted to justify the obstruction as an exercise of his undoubted right to cultivate and manage his farm; and I had occasion to observe as a result of cases such as *Jeffreys* v. *Evans* (1), *Gearns* v. *Baker* (2), and *Fetherstonhaugh* v. *Hagarty* (3), that so long as the tenant is *bona fide* and reasonably managing and cultivating his holding the landlord must (as a general rule) be content to exercise his sporting rights upon the lands as he finds them from time to time. For example, he cannot complain if the tenant in the ordinary course of cultivation drains swampy ground, with the result that snipe depart; or discontinues growing turnips, with the result that partridges disappear. The present case is a different kind of case, and raises a different kind of question. In the present case the defendant is not called upon to excuse or defend, upon the ground of his rights of cultivation and management, an obstruction to the fishing rights, because the defendant has done nothing, and has not even left anything undone, to the prejudice of plaintiff's fishing rights. The question in the present case is as to the extent of plaintiff's fishing right, and as to what it includes as necessarily incidental and ancillary to it. I agree that it includes all things necessary for the use of the thing granted, *e.g.* in the present case access to the river, the use of the bank and bed, and a right of cutting and keeping down these useless and injurious weeds. But these alleged rights of making artificial embankments and paths, and placing rocks in the bed of the river, are not, in my opinion, necessary for the use of the right granted. They would constitute enlargements and extensions of that right, which, in the absence of express agreement, cannot be insisted upon by plaintiff. As both plaintiff and defendant are obviously reasonable and sensible men, it is possible that some arrangement for their mutual advantage may be arrived at; but that is not a matter with which this Court has any direct concern.

(1) 19 C. B. (N. S.) 246. (2) L. R. 10 Ch. 355. (3) 3 L. R. Ir. 150.

Barton, J.
1905.
CALDWELL
v.
KILKELLY.

The result is that the plaintiff fails upon the two principal claims which he has put forward; and he must pay the costs of the action, save if and in so far as they have been increased by the defendant's refusal to acknowledge his right to cut weeds.

Solicitors for the plaintiff: *Montgomery & Chaytor.*
Solicitor for the defendant: *Kilkelly.*

J. MACM.

Meredith, J.
1905.
May 17.
June 8.

IN RE COLONEL WENTWORTH H. KING-HARMAN'S ESTATE; ELIZA HAYES, PURCHASER.

Landlord and tenant—Land Purchase Acts—Jurisdiction of the Estates Commissioners—Equity of the price agreed upon—Irish Land Act, 1903, *s.* 5 (1).

Where an agreement for purchase has been entered into between a landlord and a tenant, and the Commissioners are satisfied with the security for the amount of the advance applied for, the Estates Commissioners have no jurisdiction, in the absence of duress, fraud, unfair dealing, compulsion, or other ground on which a Court of Equity would stay proceedings or refuse to carry out the contract, to interfere between the landlord and the tenant on the ground that the agreed price might, in the view of the Commissioners, be too high or too low.

QUESTION OF LAW submitted by the Estates Commissioners to the Judicial Commissioner, pursuant to section 23 (1) of the Irish Land Act, 1903, on the following statement of facts:—

"In this case the holding contains 35A. 2R. 23P., and prior to the agreement for purchase was held at the non-judicial rent of £22 5*s.* 4*d.* The tenant has agreed to purchase for £571, and has applied for an advance of the entire amount. On the holding are a good two-storied slated house, out-offices, and a thatched cottage, stated to be the property of the tenant. From the report of their inspector the Commissioners have formed the opinion that the land alone is not security for more than £460, and that there is no security for the balance of the advance applied for other than the buildings stated to belong to the tenant. The

Estates Commissioners refer to the Judicial Commissioner for decision the following questions:—

(1) Have the Commissioners jurisdiction or authority to inquire into, or satisfy themselves of, the equity of the price to the tenant purchaser as well as to other persons interested in the estate, before advancing the amount agreed on?

(2) If the Commissioners have such jurisdiction, and on such inquiry are satisfied that the price is not equitable to the tenant purchaser, can they on such ground refuse to make the advance?"

By an agreement, dated the 2nd of February, 1904, between the vendor and Mrs. Hayes, the tenant, in Form F, the tenant agreed to purchase her holding for £571. The holding was held by her under a yearly rent of £22 5*s.* 4*d.*, and comprised 35A. 2R. 23P.

Herbert Wilson, K.C., and *D. M. Wilson*, for the vendor:—

The question arises on the construction of the latter clause of sect. 5 of the Irish Land Act, 1903, dealing with the sanctioning of advances in cases not within the zones, and providing that the Land Commission may advance the whole or part of the purchase-money "if they are satisfied with the security, and are of opinion that, having regard to all the circumstances of the case, the agreed price is equitable."

It is submitted on behalf of the vendor that the Land Commissioners have no jurisdiction to inquire into the equity of the price as between the selling landlord and the purchasing tenant. The word "equitable" means equitable in the ordinary and recognised legal sense. Here there is an agreement for purchase entered into between two parties who are *sui juris*, and there is no evidence or suggestion of fraud, duress, or other circumstance to vitiate the agreement, and it would require express words to get rid of the ordinary law as between vendor and purchaser, under which agreements entered into under circumstances similar to the present are specifically performed. If it could be suggested that the Land Commissioners could investigate the agreement, to see if the tenant was paying too much, it follows that they could do so to see if he was paying too little. The Estates Commissioners

Meredith, J. 1905. *In re* King-Harman's Estate. Hayes, *Purchaser.*

have no jurisdiction to undertake a judicial inquiry into duress or fraud, not being a judicial body.

Section 1 (2) deals with the case of a tenant within the zones who had contracted himself out of the zones, and it is absolutely clear that "equitable" in that sub-section only means equitable as between the vendor on the one hand and remaindermen or incumbrancers on the other hand.

Section 5 merely extends the same principle to tenants who were *ab initio* outside the zones, and section 1 (2) shows the true construction of section 5.

June 8.

The further hearing of the matter was adjourned till this date for the purpose of giving an opportunity to Mrs. Eliza Hayes, the purchasing tenant, of being represented before the Court.

Robert C. K. Wilson, for Mrs. Hayes:—

I appear for the purchasing tenant, who has entered into an agreement to purchase, and does not desire to repudiate it, but wishes the matter to be carried through; and, accordingly, I support the view put forward on behalf of the vendor.

Meredith, J.:—

In my opinion really nothing more remains to be said except that I am glad that the opportunity afforded to Mrs. Hayes of attending in Court, and presenting, through her counsel, her views upon the question to be determined, has been availed of.

For myself, I entertain no doubt that in a case in which the landlord and the tenant are both *sui juris*, in which both, acting freely and voluntarily, have entered into a solemn contract, in a case in which there exists no suspicion of fraud, duress, compulsion, or other ground which would induce a Court to stay proceedings, or refuse to carry out the contract between the parties, it would not, and ought not, to be held by any Court inequitable to allow the parties to proceed with their contract. Therefore, in this case, where, upon the facts of the case stated by the Estates Commissioners, I draw the inference that the contract is one which gives sufficient security to the State, where both the landlord and tenant appear and submit that, as between them, the

contract should be carried out as it stands, it would be giving, in my judgment, an improper and incorrect construction to the term "equitable" if I were to hold that the Estates Commissioners were bound to, or could, interfere between the landlord and tenant on the ground that *inter se* the bargain was, in the view of the Commissioners, too high or too low as to price, and thus upset the solemn agreement and contract between the parties.

I should point out that if my decision were incorrect, and that if an inquiry were instituted in the present case, a like inquiry should be made in every similar case, as it would necessarily follow from a contrary decision—that the equity arises in every case where a landlord and tenant, the landlord being an absolute owner or a limited owner, take the case of an absolute owner—in every case it would necessarily follow that the Estates Commissioners must make a full investigation into the whole question, that is to say, must not merely satisfy themselves as to the security, but must determine the question whether the landlord and tenant had bargained for a price which the Estates Commissioners might consider too low, by, say, £10, £20, or £100; or, on the other hand, which they might consider too high, by, say, £10, £20, or £100.

If such a revolution in the doctrines and principles of equity and of free contract was intended to be introduced, it would, in my opinion, have been expressed in plainer language and terms than in section 5 of the Act of 1903, "if they are satisfied with the security, and are of opinion that, having regard to all the circumstances of the case, the agreed price is equitable."

The Estates Commissioners are satisfied with the security, or else the case before me has no meaning. I must assume that they are satisfied with it.

What circumstance can be described as between landlord and tenant *inter se* more pregnant with equity, more real, more conclusive, than the circumstance of the appearance of counsel for the tenant to support the views of counsel for the landlord?

In my opinion the expression "equitable" is here used in the sense well known to lawyers—in other words, the expression should be read in the light in which Courts of Equity regard

Meredith, J. 1905.

In re KING-HARMAN'S ESTATE. HAYES, *Purchaser.*

transactions between persons entering into contracts. For example, if contracts for sale are entered into by a tenant for life, and he agrees to accept unfairly low prices, he would, I apprehend, be restrained from carrying out such contracts by a Court of Equity acting at the instance of the remainderman; so, also, prices obtained by any landlord by means of duress, or fraud, or unfair dealing, or compulsion (to give some instances of cases in which equity would be bound to interfere), would be inequitable as between landlord and tenant. Of course, it follows that in all such cases the Estates Commissioners would have full jurisdiction to act.

Upon the facts of this particular case, and the arguments addressed to me by counsel on behalf of the landlord, and having regard to the attitude adopted by Mr. R. C. K. Wilson, as counsel for the tenant, I answer the first question in the negative.

Solicitors for the vendor: *Whitney & Moore.*
Solicitor for the purchasing tenant: *Wm. Kerr.*

W. C. S.

IN THE MATTER OF THE ESTATE OF ANNA LEONORA SMITH, OWNER; WHITESTONE AND HARRISON, PETITIONERS.

Ross, J.
1904.
Dec. 6, 8, 20.

Appeal.
1905.
Feb. 16.

Will—Annuity—Duration—For life or perpetual.

A testatrix, being entitled to one undivided moiety of the lands of S. in the county of Waterford, held under a lease for lives renewable for ever, by her will, dated the 10th January, 1840, devised her interest in the lands of S. to trustees, on trust "to permit my nephew, R. B. O., to receive every year the sum of £100 during his natural life, and after his death to the use of his son or sons as may be most deserving, or as he may by will appoint." The power of appointment was never exercised. R. B. O. left two sons, who received the annuity during their lives and the life of the survivor. On the death of the survivor:—

Held, by Ross, J., and the Court of Appeal, that the annuity terminated with the death of the survivor of the two sons of R. B. O.

SETTLEMENT of schedule of priorities.

Thomas Carr, deceased, devised and bequeathed his estates in Waterford to Thomas Pyne and William Hobbs, trustees, to the use of his son George Carr for life, with remainder to his daughters Elizabeth and Frances Anne, and to their heirs lawfully begotten. Elizabeth married Simon Osborne, and died intestate in 1840, leaving Richard Boyse Osborne her heir-at-law.

Frances Anne Carr made her will, dated 10th January, 1840, the material portion of which was as follows:—"I give and bequeath my interest in the lands of Stonehouse" (which she derived under the will of Thomas Carr) "to Thomas Pyne and William Hobbs, my trustees, to have applied for the use and benefit of those named hereafter, that is to say, in trust, to permit my nephew Richard Boyse Osborne to receive every year the sum of £100 during his natural life, and after his death to the use of his son or sons as may be most deserving, or as he may by will appoint, then upon trust as to the remainder of the said property of Stonehouse, my will is that my nephew, George W. Carr, shall receive yearly and every year £50 sterling during his natural life."

Ross, J. 1904. *In re* A. L. SMITH'S ESTATE.

The testatrix then bequeathed all and every her other property to her trustees upon trust to pay certain legacies and annuities, including the following—"To my old servant Bridget Sutton a sum of £5 yearly for her life; to my other servant, Patrick Phelan, £4 yearly for life; to the Distressed Roomkeepers, and Sick Poor of the City of Waterford, Protestants, a sum of £10 yearly. I bequeath to Frances Morrison, of Waterford, the sum of £100, to set her up in business. I appoint my nephew, Richard Boyse Osborne, residuary legatee; I also give and bequeath to Alexander Pyne, to assist him in the world, £10 yearly." By a codicil, dated 11th January, 1840, the testatrix appointed Thomas Pyne and William Hobbs executors. The testatrix died on the 18th January, 1840, and probate of the will and codicil was granted to the executors on the 4th February, 1840.

By indenture, dated the 5th August, 1840, and made between Richard Boyse Osborne, of the first part; the other annuitants under the will of Frances Anne Carr, of the second part; Thomas Pyne and Wm. Hobbs, the trustees of the will, of the third part; and Arthur Smith and James Braddell, of the fourth part: reciting the facts hereinbefore stated, and that Richard Boyse Osborne, the residuary legatee, was desirous to carry into effect the intentions of the testatrix as expressed in the will, and to secure fully the annuities and legacies on the entire of the lands, Richard Boyse Osborne granted to Arthur Smith and James Braddell the lands of Stonehouse, to the use and intent that they should, during the continuance of the several yearly rentcharges or annuities bequeathed by the will of Francis Anne Carr, receive the rents and profits thereof, and, amongst other payments, "as to that sum of £100 sterling, by the year, so declared limited by the said will to the son or sons of the said Richard Boyse Osborne as should appear most deserving, or as he, the said Richard Boyse Osborne, should by deed or will limit or appoint to hold and secure the said sum of £100 sterling by the year upon the trusts mentioned in the said will," and subject thereto to the use of the said Richard Boyse Osborne, his heirs and assigns, for ever.

On the 9th October, 1852, Richard Boyse Osborne conveyed the entire of the lands of Stonehouse to Arthur Smith, the father of the present owner, absolutely, subject to the annuities.

Richard Boyse Osborne died in 1853, leaving two sons surviving—viz.: Richard Boyse Osborne the younger and John Humfrey Osborne. In December, 1891, they commenced an action in the Court of the Vice-Chancellor against the owner of the lands, to have the annuity of £100 declared well charged on the lands of Stonehouse, and to have a receiver appointed to pay the arrears of the annuity. By a decree of the Vice-Chancellor, dated the 12th March, 1892, the annuity was declared well charged on the said lands, and a receiver was appointed. The question as to whether the annuity was perpetual or for their lives only was not decided in that action. John Humfrey Osborne predeceased his brother, and Richard Boyse Osborne the younger, the survivor of the two sons, by his will, dated the 26th June, 1894, devised and bequeathed all his estate, real and personal, to his sons Percy Townsend Osborne, Gustavus Nicholls Osborne, and Melmoth Mercer Osborne, in equal shares, absolutely, and appointed them executors of his will. Gustavus Nicholls Osborne died in the lifetime of his father. Richard Boyse Osborne the younger died on the 28th November, 1899, and letters of administration with the will annexed were granted in Ireland to Lieut.-Colonel Melmoth Caulfield Gahan under power of attorney from Percy Townsend Osborne and Melmoth Mercer Osborne, who were resident in America.

In 1902 a petition for sale of the lands of Stonehouse was filed in the Land Judge's Court by Berkeley Walsh Whitestone and Mrs. Harrison, as mortgagees, for £1,000. This mortgage was created by indenture, dated the 21st December, 1859, by Arthur Smith (the predecessor in title of the owner) to W. S. Duckett and J. S. Duckett as trustees of a marriage settlement, and the petitioners had been appointed trustees of the settlement. The conditional order for sale was made absolute on the 12th August, 1902.

By an order of Barton, J., in *Osborne* v. *Smith*, dated the 20th June, 1904, the receiver was discharged in the Chancery action, and was subsequently re-appointed by Ross, J., in the present matter. An application was then made to settle the priorities in which the rents and profits of the lands were to be paid by the receiver, and in the schedule the annuity of £100 a year created by the will of Frances Anne Carr was

Ross, J. 1904. *In re* A. L. Smith's Estate.

omitted. Percy Townsend Osborne and Melmoth Mercer Osborne moved that their names should be inserted on the schedule as entitled to the annuity.

W. M. Jellett, K.C., and *John Donaldson*, for the Osbornes :—

The annuity of £100 a year is a perpetual annuity. A devise of an annuity or rentcharge, created by the will itself, without words of limitation, passes merely an annuity or rentcharge for the life of the donee, unless a different intention appears from the will. But if the testator indicates the existence of the annuity after the death of the person named, there is a presumption that it is to be perpetual: *Mansergh* v. *Campbell* (1) ; *Blight* v. *Hartnoll* (2) ; *Morgan* v. *Morgan* (3). The testatrix in this case gave the annuity to Richard Boyse Osborne "during his natural life," and after that to the use of his son or sons. And, again, the other annuities given by the will—to George Carr, to Bridget Sutton, and to Patrick Phelan—were expressly stated to be for life only. It depends on the construction of the entire will.

But, further, if the gift is not really the gift of an annuity but the gift to a person of the income arising from a particular fund or estate without limit, there the Court holds that the unlimited gift of the income is a gift of the *corpus* from which the income arises: *Courtenay* v. *Gallagher* (4) ; *Stokes* v. *Heron* (5) ; *Bent* v. *Cullen* (6). Here the testatrix devised her interest in the lands to trustees on trust to permit her nephew, R. B. Osborne, to receive £100 a year for life, and after his death to the use of his son or sons, then as to the remainder of the lands of Stonehouse to permit her nephew, G. W. Carr, to receive £50 a year during his life. That amounted practically to her entire interest in the lands. In effect, the gift to R. B. Osborne and his sons is a gift of portion of the estate, and not of an annuity merely.

(1) 3 De G. & J. 232.
(2) 19 Ch. D. 294.
(3) [1893] 3 Ch. D. 222.
(4) 5 Ir. Ch. R. 154.
(5) 12 Cl. & Fin. 161.
(6) L. R. 6 Ch. 235.

C. A. O'Connor, K.C., and *R. D. Murray*, for the petitioners:— *Ross, J.* 1904.

In re A. L. SMITH'S ESTATE.

There being no words of limitation in the gift of the annuity of £100 a year to the sons of Richard Boyse Osborne, that annuity only lasted for their lives and the life of the survivor, and is not perpetual: *Blewitt* v. *Roberts* (1); *Lett* v. *Randall* (2); *Wilkins* v. *Jodrell* (3); *Re Forster's Estate* (4); *Morgan* v. *Morgan* (5). This is a mere gift of an annuity, and does not amount to an appropriation of a portion of the estate to the annuitants.

Ross, J.:— Dec. 20.

The question I have to decide is whether under the will of Frances Anne Carr, executed on 10th January, 1840, an annuity of £100 is a perpetual annuity.

The testatrix gave and bequeathed her interest in the lands of Stonehouse to certain trustees, adding the following words:— "To have applied for the use and benefit of those named hereafter, that is to say, in trust to permit my nephew, Richard Boyse Osborne, to receive every year the sum of £100 during his natural life, and after his death to the use of his son or sons as may be most deserving, or as he may by will appoint, then upon trust as to the remainder of the said property of Stonehouse, my will is that my nephew, George W. Carr, shall receive yearly, and every year, £50 sterling during his natural life." She then goes on to dispose of her other property. I do not think that any light is thrown on the nature of the annuity by the rest of the will. Richard Boyse Osborne received the annuity during his life; after his death, his two sons received it during their lives. On the death of the survivor the question arises, Does the annuity cease with their lives, or does it go on?

The rules of law and the canons of construction applicable to gifts of annuities have been laid down in numberless cases, and may now be taken as fairly well settled. There is no substantial difference between the case of a gift of a rentcharge issuing out

(1) Cr. & Ph. 274.
(2) 2 De G. F. & J. 388.
(3) 13 Ch. D. 564.
(4) 23 L. R. Ir. 269.
(5) [1893] 3 Ch. D. 222.

Ross, J. 1904. *In re* A. L. Smith's Estate.

of lands, and an annuity payable out of personal estate. A gift of an annuity to a person is a gift of an annuity for the life of that person, and nothing more. Again, a gift of an annuity to a person for life, with remainder to another *simpliciter*, means that the second taker is to have it for his life, and no longer. To make the annuity perpetual in either such cases, the testator must indicate an intention to that effect. He may do so by declaring or describing the annuity as perpetual, or he may do so by directing the property out of which it comes to be dealt with in a certain way for the purpose of keeping up the annuity. In case he segregates or appropriates a particular or definite portion of property for the purpose of the annuity, we ought to infer that the gift of the income of the portion so segregated is the gift of the *corpus*, and in that case the annuity is perpetual. On the other hand, if he merely creates a charge on property, we ought to infer that there is no gift of the *corpus*, and in that case the annuity is not perpetual. In the former case it is the duty of the trustees actually to appropriate—that is, to set aside—sufficient property to meet the annuity, and nothing else. In the latter case they have no such duty.

These principles appear plain enough, but their application in the case of particular wills is not so easy. It must always clearly be borne in mind that the mere charge of an annuity on any particular property does not *per se* involve the segregation of a definite part of the property to meet the annuity. I have read all the cases cited in the argument. If I am right in the principle which I have gathered from the cases, it is unprofitable to discuss the particular words used in the several wills on which the Courts based their conclusions.

I now turn to the will before us. In giving the annuity to Richard Boyse Osborne the testatrix uses the words, "in trust, to permit my nephew to receive each year the sum of £100 during his natural life." When she comes to the gift in remainder, she uses different language; but then, it must be remembered, she had something more to say, *i.e.* "to the use of his son or sons as may be most deserving, or as he may by will appoint." I cannot find anything in these words to show that she intended the annuity to be perpetual; nor can I see how the power of appoint-

ment affects the question: it is equally consistent with either theory. You can appoint a life annuity as well as a perpetual annuity.

The next contention is that the words, "as to the remainder of the said property of Stonehouse," presuppose a segregation of a part of the lands of Stonehouse sufficient to meet the annuity of £100. But the word "remainder" is a neutral expression: it is consistent with either theory. It may be the remainder of the property when a portion thereof has been segregated sufficiently to meet the annuity of £100; or it may be the remainder of the rents and profits of the property after the annuity of £100 has been satisfied. The word is no stronger than "residue," and nothing decisive can be inferred from its use. Would the trustees have been justified in actually appropriating a definite portion of the lands sufficient to meet the annuity? If so, the segregation must have been made once for all. If the portion so segregated turned out more valuable than was anticipated, the annuitant would be entitled to it, notwithstanding the increase in value. If it had turned out less valuable, the annuitant could not go outside the portion so segregated. The words of the context do not give any support to this contention; and I am led to the conclusion that the annuity is a charge, and a charge only.

It has been contended that I must have regard to the tenure, *i.e.* a lease for lives renewable for ever. But when the interest of the testatrix is of a perpetual character, I cannot imagine how that can affect her intention in respect of the nature of the annuity.

For these reasons I hold that the annuity expired with the lives of the second takers, and I refuse to insert it in the schedule.

W. C. S.

Percy T. Osborne and Melmoth M. Osborne appealed.

Jellett, K.C., and *Donaldson*, for the appellants.

O'Connor, K.C., and *R. D. Murray*, for the respondents.

Appeal. 1905. *In re* A. L. SMITH'S ESTATE.

THE COURT OF APPEAL (FitzGibbon, Walker, and Holmes, L.JJ.) dismissed the appeal without calling on counsel for the respondents.

Solicitors for the petitioners: *Stephen Gordon & Son.*

Solicitors for Percy T. Osborne and Melmoth M. Osborne: *Carruthers & Gamble.*

R. D. M.

Ross, J. 1905. June 20.

IN THE MATTER OF THE ESTATE OF ANNA LEONORA SMITH, OWNER; WHITESTONE AND HARRISON, PETITIONERS (No. 2).

Limitations, Statute of—Estate in Land Judge's Court—Date from which operation of statute is suspended.

The order for sale which prevents the operation of the Statute of Limitations in respect of an estate in the Land Judge's Court (within the rule laid down in *Colclough's Estate*, 8 Ir. Ch. R. 330) is the absolute order, and not the conditional order.

A FURTHER question arose in this case, whether a judgment was barred under the Statute of Limitations.

In or as of Trinity Term, 1837, George Briscoe obtained a judgment against Richard Boyse Osborne, the predecessor in title of the owner herein, in the Court of Exchequer for the sum of £800, debt, besides costs, on foot of a bond to secure £400, with interest at the rate of £5 per cent. George Briscoe died in the year 1862, and letters of administration of his personal estate were subsequently granted to his widow, Henrietta Louisa Briscoe, who, on the 17th October, 1864, in consideration of £400, assigned the judgment to Isaac Thornton. This judgment was re-registered from time to time. An action was instituted in the Court of the Vice-Chancellor (*Osborne* v. *Smith*) to have an annuity (1) declared well charged on the lands for sale herein; and a receiver was appointed in June, 1892. This action terminated on the 20th June, 1904, and the receiver was discharged.

(1) The subject of the preceding case.

Ross, J.
1905.

In re
A. L. SMITH'S ESTATE.
(No. 2.)

On the 29th January, 1894, Isaac Thornton applied, in the action of *Osborne* v. *Smith*, to have the receiver extended to the judgment: notice of this application was not served on the owner, who was resident in Corea. Mr. Justice Monroe made the order. Before Isaac Thornton had time to make any further application on foot of the order—which was not made up—he died on the 17th February, 1894. It was stated that no further proceedings were taken thereunder because Isaac Thornton's representatives considered that, owing to the large arrears due on foot of the annuity, there would be no money available to meet their claim. A bank-book of a former receiver in *Osborne* v. *Smith* was produced from which payment of interest on the 31st July, 1890, to Isaac Thornton on foot of this judgment was claimed to be proved; and this, coupled with a statement in the affidavit of Isaac Thornton, used on the application to extend the receiver on the 29th January, 1894, that interest on the judgment up to the 10th April, 1890, had been paid, was relied on as proof of such payment. Ross, J., held that the bank-book did not sufficiently or clearly show that the entry therein referred to a payment in respect of the judgment, and that as the affidavit of Isaac Thornton was not served on the owner, she would not be affected by its contents. However, he allowed the legal question to be argued on the assumption that such payment was proved. The conditional order for sale herein was made on the 27th January, 1902, and this order was made absolute on the 12th August, 1902. The net point, then, for decision was:—Assuming such interest had been paid on the 31st July, 1890, which was more than the twelve years before the date of the absolute order for sale, but less than twelve years from the date of the conditional order, was the date of the conditional order, or that of the absolute order, the crucial date of an order which would prevent the Statute of Limitations running?

G. F. Brunskill (with him *C. A. O'Connor, K.C.*), for Ernest Thornton and Anne Eliza Thornton, the personal representatives of Isaac Thornton:—

The absolute order relates back to the date of the conditional order. See the judgment of the Lord Chancellor in *Colclough's*

Ross, J. 1905. *In re* A. L. Smith's Estate. (No. 2.)

Estate (1), where the filing of the petition is stated to be the crucial date. In *Nixon's Estate* (2) the question as to which was the crucial date did not arise; and in *Wade's Estate* (3) Palles, C.B., states (p. 527) that it was not necessary to decide the question. In *Irish Land Commission* v. *Davies* (4) Monroe, J., says (p. 349):—"The statute ceases to run, pending a petition, against all claims properly put forward in the petition." Mr. Thornton's judgment was in the schedule to the petition. Although it was held in *In re Henry's Estate* (5) that, for the purpose of effecting a conversion, the absolute order did not relate back to the conditional order, yet that decision is distinguishable, for it could not be said that there was a conditional conversion. In *In re Stinson's Estate* (6) Monroe, J., says:—"The petitioner relies on the filing of the petition, or, at all events, on the conditional order, to which the absolute order, when made, must relate back, as sufficient to prevent her claim from being barred." The form of the conditional order is that the lands be sold to discharge the incumbrances thereon. A primary decree in an administration action is a bar to the statute; the making of a conditional order for sale is on the same footing as a primary decree. In *Vickery* v. *Deane* (7) it was held that the provisional order sanctioning an advance by the Land Purchase Commissioners suspended the rights of the landlord as to the recovery of arrears of rent.

[The following cases were also cited:—*In re Swanton's Estate* (8); *In re Bateson's Estate* (9).]

Samuels, K.C., and *M'Carthy Mahony*, for the owner:—

It is clear from the subsequent cases that Blackburne, L.J., in *In re Colclough's Estate* (1) referred to the absolute order for sale, and not the conditional order. See also *In re Wade's Estate* (3), and the judgment of the Lord Chief Baron, at p. 526. This was

(1) 8 Ir. Ch. R. 330.
(2) Ir. R. 9 Eq. 7.
(3) 13 L. R. Ir. 515.
(4) 27 L. R. Ir. 334.
(5) 31 L. R. Ir. 158.
(6) 29 L. R. Ir. 490.
(7) 32 L. R. Ir. 36.
(8) [1898] 1 I. R. 157.
(9) [1895] 2 I. R. 559; [1896] 2 I. R. 171.

cited with approval by Walker, L.J., in *In re Bateson's Estate* (1). Section 53 of the Landed Estates Court Act directs that when it shall appear to the Judge that a sale may be found expedient, he shall direct notice to be given to such persons, and in such manner, as he shall think fit; and it is only after hearing such persons that he is enabled to make an order for sale. The mode adopted by the Court of giving notice is to serve a conditional order on the necessary persons. The conditional order is therefore merely the means used of giving notice to such persons, and until they have been heard there is no order for sale within the section. It is quite clear that a consideration of that section led Monroe, J., in *In re Henry's Estate* (2) to say (at p. 166):—"It could hardly be contended that the filing of a petition for sale by a person *sui juris* in itself worked a conversion. The conditional order which is required, if the Court thinks fit, to be served on the owner or some of the incumbrancers is an intimation that unless reasons to the contrary are shown the Court will, at some future time, make an order for sale. If no reasons are shown, the Court simply makes an order for sale, and no more." [Ross, J.: The conditional order is not mentioned in the statute at all.]

O'Connor, K.C., in reply:—

The conditional order for sale is made absolute unless cause is shown, and it has so much force that a receiver will be appointed after the date of the conditional order.

Ross, J.:—

I have already decided against the contention of the incumbrancer. On the facts disclosed I am not satisfied that there is proof of a payment within the Statute of Limitations, or that there is evidence from which I could infer payment. Notwithstanding that, I allowed the real question—one of law—to be argued on the assumption that a half year's interest was paid on the 31st of July, 1890, that is, on a date within twelve years before the making of the conditional order.

How does the law stand? *Colclough's Estate* (3) was the

(1) [1896] 2 I. R. at p. 179. (2) 31 L. R. Ir. 158. (3) 8 Ir. Ch. R. 330.

Ross, J.
1905.

In re A. L. SMITH'S ESTATE. (No. 2.)

first decision that an absolute order for sale made by the Court enured for the benefit of all parties interested in the estate. The Lord Chancellor went further in that case, and held that from the moment the petition was lodged, the Court became the trustee for the parties. In *Nixon's Estate* (1) the reasons which were present to the mind of the Lord Chancellor were strongly repudiated by both the members of the Court; and from that time every Judge has repudiated the suggestion that the Court can be a trustee for the party interested in the estate.

Although the point has never been actually decided, the whole practice of the Court depends on the theory that the conditional order is not for the benefit of anybody except the petitioner. There is nothing to prevent any other incumbrancer upon the estate filing another petition for the sale of the estate after the original petition is filed and the conditional order made thereon. As a matter of fact, the practice in my time has been under such circumstances to make both conditional orders absolute and to consolidate the proceedings, giving the carriage to the party most deserving. That rests on the theory that the petitioner is *dominus litis* until the order is made absolute; after that nothing is done except upon notice to all parties. Further, if good cause is shown against the conditional order, the order will be discharged without notice to any other incumbrancer. That being so, I am of opinion that Mr. Justice Monroe's interpretation of section 53 is correct.

There is no mention in the Landed Estates Court Act of a conditional order, only of an order for sale; the conditional order is merely a matter of procedure. In *Henry's Estate* (2) Mr. Justice Monroe says:—"The conditional order which is required, if the Court thinks fit, to be served on the owner or some of the incumbrancers is an intimation that unless reasons to the contrary are shown the Court will at some future time make an order for sale. If no reasons are shown, the Court simply makes an order for sale, and no more. There is no relation back to any previous order." It is not till the order is made absolute that the interest of incumbrancers, other than the petitioner, arises.

I am against the contention of the incumbrancer on both

(1) I. R. 9 Eq. 7. (2) 31 L. R. Ir. at p. 166.

points. I hold that he has failed in point of proof that payment on the 31st July, 1890, was made in respect of interest on this incumbrance; and, even if he had proved payment on that day in respect thereof, his claim would be barred.

Ross, J.
1905.
In re
A. L. SMITH'S ESTATE.

Solicitor for the personal representatives of Isaac Thornton: *Thornton.*

Solicitors for the owner: *Dobbyn & M'Coy.*

W. C. S.

HERRING-COOPER *v.* HERRING-COOPER.

(1904. No. 714.)

Barton, J.
1905.
June 14.
July 1.

Executory marriage articles—Covenant to convey real estate to use of children of marriage as tenants in common and their respective heirs and assigns—Death of son under twenty-one—Survivorship to other children.

By an indenture made in consideration of his intended marriage with B., W. covenanted with a trustee that he would convey and settle certain real estate to the use of himself for life, with remainder to the use that B. should receive a jointure, with remainder to the use of the children of W. and B. in equal shares as tenants in common and their respective heirs and assigns. A son of the marriage died in the lifetime of W., under age, and without having married:—

Held, that the other children, all of whom had attained twenty-one, became entitled to the entire estate, subject to the life interest and jointure.

ACTION for a declaration that the plaintiff was entitled, under marriage articles dated the 28th July, 1855, to the one undivided fourth part of the lands thereby covenanted to be settled which had been vested in Fitzmaurice Herring-Cooper, deceased.

The only evidence of the marriage articles which was forthcoming consisted of the registered memorial, an office copy of which was by consent received as evidence of the contents and execution thereof.

The memorial, so far as material, was as follows:—A memorial of an indenture of marriage articles, dated the 28th July, 1855, and made between William Herring-Cooper, of the first part;

Barton, J. 1905. HERRING-COOPER *v.* HERRING-COOPER.

James Fitzmaurice and his daughter, Barbara Harriett Fitzmaurice, of the second part; and Harman Fitzmaurice, of the third part: reciting an intended marriage between the said William Herring-Cooper and Barbara Harriett Fitzmaurice; the said deed witnessed that, in consideration of said intended marriage, William Herring-Cooper did thereby covenant with Harman Fitzmaurice, his heirs and assigns, that if the marriage should take effect he should convey, settle, and assure all his estate and interest in the lands therein mentioned, that is to say, . . . to the use of the said William Herring-Cooper for his life, with remainder to the use that the said Barbara Harriett Fitzmaurice should receive thereout the annual sum of £150 sterling in lieu of dower and thirds, with remainder to the use of the children of the said William Herring-Cooper and Barbara Harriett Fitzmaurice, in equal shares as tenants in common, and their respective heirs and assigns.

The lands were held in fee-simple or fee-farm.

The marriage was solemnized, and there were four children issue thereof, viz. the defendant, Evaline Constance Boeddicker; the plaintiff, Harman Herring-Cooper (the eldest son); the defendant, William Herring-Cooper, and Fitzmaurice Herring-Cooper.

Fitzmaurice Herring-Cooper died in 1886, under twenty-one, and without having married, leaving his father his heir-at-law, who died intestate in 1892.

From the death of their father the plaintiffs and defendants had been in receipt of the rents and profits, subject to their mother's jointure, in equal shares.

Portion of the lands had now been sold under the Land Purchase Acts; and on the investigation of title the question arose whether Fitzmaurice Herring-Cooper had taken a vested and indefeasible interest, or whether the plaintiff and defendants were entitled in equal shares.

S. L. Brown, K.C. (with him *W. G. Gibson*), for the plaintiff:—

If the words, "to the use of the children . . . in equal shares as tenants in common and their respective heirs and assigns," were in a marriage settlement, they would confer a vested estate in fee, and the question is whether here, because they are con-

tained in executory articles, they must receive a different construction, and be deprived of their legal meaning, and a cross-remainder should be regarded as inserted in the event of a child's death under twenty-one, or under that age and without being married.

The principle underlying the decisions is that where a settlor or testator is not his own conveyancer, but only indicates his intention, the Court is bound to discover, if possible, and act on, that intention. If the intention can be discovered from the document, the Court must follow it and act upon the document. In the case of marriage articles, if there is nothing in the document to show the intention, the Court will presume an intention to provide for the issue of the marriage. In none of the reported cases, however, has more than a general intention to provide for the issue been presumed. The Court would depart from the strict meaning of the words used where they would, under the Rule in *Shelley's Case* (1), give the husband an estate tail. See the principles on which the Court acts stated in Underhill's Law of Trusts (6th ed.), 102, 103. See also *Earl of Stamford* v. *Hobart* (2); *Sackville-West* v. *Viscount Holmesdale* (3).

In the present case the settlor keeps a life estate only, and, subject to that and the jointure, the property is to go to the children and their heirs. In no way could the father obtain control of the estate; the issue are securely provided for; and the usual reason for departing from the words used does not exist. The words used bear a well-known legal meaning, and it would be impossible to express an intention to give a vested fee-simple estate more clearly or in more appropriate legal conveyancing language—the estate to be taken is clearly defined. There is nothing outside the document to indicate any other intention. In the cases in which cross-remainders have been inserted, the exact estates given by the document were not defined as here.

Fetherstonhaugh, K.C. (with him *F. F. Denning*), for the defendants:—

The question which the Court has to determine in such a case as the present is, What settlement would a conveyancer prepare

(1) 1 Co. 88 *b*. (2) 3 Bro. P. C. 31, 33. (3) L. R. 4 H. L. 543.

Barton, J. 1905. HERRING-COOPER *v.* HERRING-COOPER.

on the articles if they were laid before him as instructions for a settlement? A remainder, as here expressed in the articles, would be a most unusual one as regards realty. Moreover, there is no limitation in case of there being no children of the marriage. As to the nature of the settlement to be made in pursuance of an executory trust, see 1 Vaizey, Settlements, 159; and as to the free interpretation given to articles, *ibid.* 174. The object and purpose of marriage articles themselves furnish an indication of intention. See *Blackburn* v. *Stables* (1); and as to modifying the words used, *Stonor* v. *Curwen* (2). See also *Rossiter* v. *Rossiter* (3); *Taggart* v. *Taggart* (4); *Roche* v. *Roche* (5). In 2 White and Tudor, L. C. (7th ed.), 778, after referring to those cases, it is stated: "This principle would now be followed with a variation, corresponding with a change in the practice of conveyancing, by making the interests of the children contingent on their attaining twenty-one being sons, or being daughters attaining that age or marrying," and *Cogan* v. *Duffield* (6) is cited. See further *Marchioness of Blandford* v. *Duchess of Marlborough* (7); *Randall* v. *Willis* (8); *Mayn* v. *Mayn* (9), recognizing *Taggart* v. *Taggart* (4); *Hubert* v. *Parsons* (10); *Hynes* v. *Redington* (11). *Roche* v. *Roche* (5) shows that clauses of survivorship and accruer are so usual that any conveyancer would insert them. There is no precedent of a settlement without such provisions; and see 1 Vaizey, 186. Here the articles should be expanded, and the intention to provide for the issue should be carried out in the usual way. The interests to be taken by the husband and wife are defined, and a settlement, if prepared, should be framed so as to prevent them indirectly acquiring more.

S. L. Brown, K.C., in reply:—

The fact that vested interests in the case of realty are unusual is in the plaintiff's favour, as the estate given is here so accurately

(1) 2 V. & B. 367.
(2) 5 Sim. 264, 268, 269.
(3) 14 Ir. Ch. R. 247.
(4) 1 Sch. & Lef. 84.
(5) 2 Jo. & La. 561.
(6) 2 Ch. D. 44, 48.
(7) 2 Atk. 542, 545.
(8) 5 Ves. 262.
(9) L. R. 5 Eq. 150.
(10) 2 Ves. Sen. 261.
(11) Ll. & G. *t.* Plunket, 33, 41.

defined as to indicate an intention as to its extent. In all the cases cited the gift to children was in words which raised the question. Those cases also were cases of doubtful construction; and the Court had to endeavour to ascertain the intention, which was not clear. In *Taggart* v. *Taggart* (1) the question arose on the interpretation to be placed on "issue," a word of doubtful meaning. In *Cogan* v. *Duffield* (2) the articles were "nothing but rough minutes, or heads of instructions for a settlement," "very rough indeed" (3). Here that is not at all so: the words used are clear, and are inconsistent with cross-remainders. There is no case in which cross-remainders were directed when the words were clear.

July 1.

BARTON, J.:—

This case turns upon the construction and effect of an indenture of marriage articles, dated the 28th July, 1855, and made in contemplation of the marriage then intended and shortly afterwards solemnized between William Herring-Cooper and Barbara Harriett Fitzmaurice. By consent the memorial enrolled in the Registry of Deeds is to be taken as evidence of the contents and due execution of the original articles, which are not forthcoming. In the memorial the deed is described as an "Indenture of marriage articles," and the material parts of the memorial are as follows:—"The said deed of which this writing is a memorial witnessed that in consideration of said intended marriage the said William Herring-Cooper did thereby covenant with the said Harman Fitzmaurice, his heirs and assigns, that if the said marriage should take effect he, the said William Herring-Cooper, should convey, settle, and assure all his estate and interest in the several lands and premises therein mentioned . . . . to the use of the said William Herring-Cooper for his life, with remainder to the use that the said Barbara Harriett Fitzmaurice should receive thereout the annual sum of £150 sterling, in lieu of dower and thirds, with remainder to the use of the children of the said William Herring-Cooper and Barbara Harriett Fitzmaurice, in equal shares, as tenants in common and their respective heirs and assigns."

(1) 1 Sch. & Lef. 84. (2) 2 Ch. D. 44. (3) *Ibid.* 48.

Barton, J.
1905.
HERRING-COOPER
v.
HERRING-COOPER.

There were four children of the marriage—Evaline, Harman, William, and Fitzmaurice. Fitzmaurice died in 1886, an infant, unmarried, and intestate. His father and the three other children survived him. The father died in 1892 intestate; the three remaining children survived him, and are the parties to this action. Since the happening of these events the three surviving children have been in possession of the rents and profits of the settled lands. It is now contended, on behalf of the eldest son, Harman Herring-Cooper, that during all these years the parties have proceeded upon a mistaken view of their respective rights; that upon the true construction of the marriage articles each child took a vested interest at birth; and that the share of Fitzmaurice, who died in infancy, passed at his death to his father as his heir-at-law, and at the father's death to the eldest son, Harman, as his heir-at-law. The point appears to have been suggested in the course of an investigation of title in the Irish Land Commission; and it has become necessary to set matters at rest by this action.

In my opinion the parties have hitherto proceeded upon the true and correct view of their respective rights. The instrument to be construed is not a deed of marriage settlement, but of marriage articles, which are mere "short heads or minutes to be afterwards drawn out at length according to the ordinary course of settlement." A paramount purpose of marriage articles is presumed to be to make effectual provision for the children of the marriage; but the articles only contain upon their face the short heads or minutes of what that provision is to be. Upon the face of these articles the provision to be made for the children is summarised in a heading of the barest possible description. The settlor covenanted to secure to them a remainder of the whole settled property subject to his life interest and subject to the wife's jointure. If a conveyancer had to draft, or if this Court had to decree, a settlement in pursuance of a short heading of that kind, care should, I think, be taken, according to the ordinary course of settlement, to frame the limitations of the settlement so as to prevent a child who should die under twenty-one, or, being a daughter, should die unmarried, becoming absolutely entitled to any part of the settled property. The ordinary course of settlement follows lines prescribed by prudence and experience. Provision for

children is not usually given to them by prudent settlors or benefactors, before twenty-one, or, in the case of a daughter, before marriage. Another and a cogent reason may be to prevent the parent, against the presumed intention of the parties, acquiring a title, as personal representative, to the share of children dying in infancy. Otherwise, if there were ten children, and eight died in infancy, the parent would acquire the absolute interest in four-fifths of the settled property, and the remainder, which was presumably intended to be assured to the children of the marriage, would operate effectually only upon one-fifth. Such a result, although it might be consistent with some of the technical words of the "short heading," would conflict with the presumed and paramount purpose of the whole instrument, and would not accord with the ordinary course of settlement. Similarly, the Courts frequently construe words in articles as words of purchase, which, if read literally and technically, would have the effect of words of limitation, and constantly refuse to follow the technical language of articles, when doing so would, by the application of the Rule in Shelley's Case, enable a parent to defeat provisions presumably intended for children. Cases of that kind are notable and familiar examples of a general principle of construction of articles entered into in contemplation of marriage. That general principle applies also, in my opinion, to the present case. If authority is necessary for applying it to the present case, it is to be found, I think, in the judgment of Lord Hardwicke in *Hubert* v. *Parsons* (1), in the decree of Lord Redesdale in *Taggart* v. *Taggart* (2), and in the judgments of James, L.J., and Baggallay, J.A., in *Cogan* v. *Duffield* (3).

For these reasons I am of opinion that the plaintiff's claim cannot be maintained, and that the action must be dismissed.

Solicitor for the plaintiff: *Edward S. Maffett.*
Solicitor for the defendants: *Richard F. Barry.*

D. M'C. M.

(1) 2 Ves. Sen. 261, 263. (2) 1 Sch. & Lef. 84, 88, 89.
(3) 2 Ch. D. 44, 48, 50.

Appeal.
1905.

BARTON *v.* M'FADDEN (1).

May 16, 17. *Landlord and tenant—Covenant—Statutory condition—Tenancy subject to—Opening a house for sale of intoxicating liquors—Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 5.*

J. M. was tenant to the plaintiff of a farm of land held under a judicial tenancy, and there was a spirit license attached to the dwelling-house on the farm. The fair rent for the second statutory term was fixed in July, 1897. J. M. died in 1898, leaving a daughter, and a son (the defendant) then in America. The daughter obtained letters of administration to her father in 1898, and obtained a transfer of the license into her own name. In June, 1904, the daughter died without having administered her father's assets. She made a will, but did not appoint an executor. The defendant, having returned from America, entered into possession of the premises, and applied for and obtained, at the Annual Licensing Sessions in October, 1904, a transfer of the license, subject to representation being raised by him to his deceased sister.

In December, 1904, the plaintiff obtained an order for a writ of *certiorari* to quash the order transferring the license to the defendant. At the Quarter Sessions in January, 1905, the defendant, without asking the plaintiff's consent, obtained a certificate for a new license, notwithstanding the plaintiff's objection:—

Held (reversing the decision of the Master of the Rolls), that, upon the order of October, 1904, transferring the license, being quashed, the house ceased to be licensed; that obtaining a new license for the premises was "opening a publichouse" within the meaning of sect. 5, sub-sect. 6, of the Land Law (Ireland) Act, 1881; and that the plaintiff was entitled to an injunction to restrain the defendant from keeping the house open as a public-house.

APPEAL from an order of the Master of the Rolls refusing the plaintiff's motion for an injunction.

The action was brought for an injunction to restrain the defendant from opening, or keeping open, without the consent of the plaintiff as landlord, a house for the sale of intoxicating liquors, upon a holding subject to statutory conditions, situate at Duntinny, in the county of Donegal.

(1) In the Court of Appeal, before FITZGIBBON, WALKER, and HOLMES, L.JJ

The plaintiff was owner in fee of the lands of Gortnacor and Duntinny, in the county of Donegal. John M'Fadden formerly held a farm in the townland of Gortnacor, as judicial tenant to the plaintiff, the fair rent for the second term in which had been fixed at the annual sum of £4 3*s.* on the 8th July, 1897. The house, which was situate on the townland of Duntinny, had a spirit license attached to it. John M'Fadden died intestate in 1898, leaving him surviving his widow (who died in November, 1898), a son, Neill M'Fadden (then in America), and a daughter, Mary M'Fadden. On the 3rd October, 1898, Mary M'Fadden took out administration to her father, and duly obtained a transfer of the license into her own name. Mary M'Fadden died on the 2nd June, 1904, without having administered the estate of her father, but having made a will without naming an executor.

Neill M'Fadden returned to Ireland in 1904, and on the 10th October, 1904, he applied for and obtained a transfer of the license from the magistrates at Letterkenny, "subject to representation to said Mary M'Fadden, deceased, being raised by him."

The plaintiff applied to the King's Bench for a writ of *certiorari* to quash this order, on the ground, as the plaintiff stated, that the defendant had no title, and, by order of the King's Bench, dated the 12th December, 1904, the order transferring the license to the defendant was quashed.

On the 20th January, 1905, the defendant applied at the Quarter Sessions at Lifford for a new license for the sale of intoxicating liquors on the holding. The constabulary opposed the application, and the plaintiff also opposed on the ground that the consent of the plaintiff, as landlord, had not been obtained, under sect. 5, sub-sect. 6, of the Land Law (Ireland) Act, 1881. The County Court Judge granted the defendant the certificate necessary to enable him to obtain a new license.

On the 22nd February, 1905, the plaintiff applied for an injunction to restrain the defendant from opening, or keeping open, without the consent of the plaintiff, as landlord, a house for sale of intoxicating liquors on the holding.

The defendant proved that, after the death of his sister, Mary M'Fadden, he obtained letters of administration *de bonis non* to his father's estate on the 5th October, 1904, and also letters

Appeal. 1905. BARTON v. M'FADDEN.

of administration, with the will annexed, to the estate of Mary M'Fadden on the 2nd December, 1904, and that on the death of Mary M'Fadden the defendant applied for and obtained a transfer of the license from the magistrates at Petty Sessions at Tamney, in the county of Donegal, and he also obtained a confirmation of the transfer at the Annual Licensing Quarter Sessions at Letterkenny, on the 10th October, 1904.

The defendant stated that the ground upon which the order of the Justices, confirming the transfer, was quashed by the King's Bench, was that the said order was, on the face of it, informal, as it contained a condition that the defendant should obtain letters of administration to the personal estate of Mary M'Fadden, which said condition the Justices had no power in law to attach to their said order.

On the 2nd December, 1904, the defendant obtained letters of administration, with the will annexed, to Mary M'Fadden, and on the 20th January, 1905, he obtained a license from the magistrates at Lifford in lieu of the former license. The house had been licensed since 1853, and was so at the date the order was made fixing the fair rent of the holding, on the 1st March, 1883, and when the fair rent order for the second statutory term was made on the 8th July, 1897.

On the 28th February, 1905, the Master of the Rolls refused the application for an injunction, and the plaintiff appealed.

The following was the judgment of the Master of the Rolls:—

Sitting as a Court of co-ordinate jurisdiction, I could not overrule the decision of the Vice-Chancellor in *Richardson* v. *Murphy* (1), even if I disagreed with it. But there is a distinction between the present case and *Richardson* v. *Murphy* (1). The Vice-Chancellor there held that the statutory conditions were imported into the contract of letting just as if they were covenants, and not merely con-

(1) [1899] 1 I. R. 248

ditions. *Richardson* v. *Murphy* (1) may, therefore, be good law without governing the present case. Some of these statutory conditions may be much more than mere common law conditions, they may be incidents of the tenancy, or equivalent to express covenants. For example, sub-letting without consent of the landlord is a breach of a statutory condition, just as opening a house for the sale of intoxicating liquors without consent of the landlord is a breach of a statutory condition; but it is more than that. The enactment against sub-letting without consent is much more than a mere condition, it is an incident of the tenancy, founded on public policy, as declared in a series of Acts ending with the Landlord and Tenant (Ireland) Act, 1860, commonly called Deasy's Act, which makes sub-letting without consent unlawful. There is no such principle of prohibition founded on public policy in reference to opening a house for the sale of alcoholic liquors. So in the case of waste, it is one of the statutory conditions that a tenant shall not commit waste, just as it is one that he shall not open a house for the sale of intoxicating liquors on his holding without the consent of the landlord; but the former is a great deal more than a mere condition, it is a breach of the fundamental duty of the tenant to his landlord at common law; and it is one of the oldest heads of equity to restrain waste. Opening a house for the sale of intoxicating liquors on the holding is not in itself waste, although building a new house on the holding might in certain circumstances amount to waste; but there is no question of that kind here, as the same house has been used for that purpose for a very long time. I have nothing to do here with *Clitheroe's Case* (2), nor with the provisions of the licensing laws. This is purely a question between landlord and tenant. If there is any breach of the licensing laws, the defendant can be dealt with under them, but I have nothing to do with that. The intention of the statute was, no doubt, to prevent a tenant from opening a house for sale of intoxicating liquors on the holding where there was none before, without the landlord's consent, but it was confined to statutory or judicial tenants. It is to be borne in mind that this house has been open as a licensed house for a long

(1) [1899] 1 I. R. 248. (2) I. R. 11 C. L. 412.

Appeal. 1905. BARTON v. M'FADDEN.

series of years. The father of the defendant had it, then his daughter; and now the defendant, who has been recognised by the landlord as tenant, is in possession, has taken out administration to his father and sister, and has got a license. I must treat him as a lawful administrator, and as a lawful license-holder. What occurred at the Quarter Sessions in October last was in the nature of a slip or accident. The transfer then granted was afterwards set aside for an informality in the order. Mr. Healy says that it is no matter if it was a slip or accident; that there was a breach of the condition, as the house was closed, and afterwards opened by the defendant. But it was a slip. The Quarter Sessions was not dealing with the same license as the present one, but it was obtained in the same right as that which existed all through the statutory term without any objection by the landlord. The question of the right of the plaintiff to an injunction depends on two considerations—(1) is there a breach of the statutory condition? and (2) if there has been a breach of the condition, was it of such an extent, or of such a character, as to justify this Court in interfering by way of injunction? I have had the advantage of listening to a learned argument by Mr. Ronan as to the difference in granting injunctions in the case of covenants and in the case of conditions pure and simple. He contends that this is a case of condition pure and simple, and that *Richardson* v. *Murphy* (1) is distinguishable, as the Vice-Chancellor there considered that he was dealing with a case of breach of covenant. If I had to decide it as a new point, the condition here would appear to me to be a condition pure and simple, and I would say that Mr. Ronan was right. Since the Judicature Act the power of granting an injunction is wider than before; but I am not aware of any injunction having been granted when there is a simple remedy by ejectment expressly provided. Assuming, however, that there is jurisdiction to grant an injunction, the question is, as I have said, has there been a breach of the condition, and such a breach as to call for interference by injunction? Mr. Healy says that the landlord would be obliged to evict the tenant, and why should he be driven to evict him? I have nothing to do

(1) [1899] 1 I. R. 248.

with that. For all I know, it may be better for the tenant to be evicted than that he should be saddled for the rest of the term with a rent which, however small, was, no doubt, fixed having regard to the fact of the house being a publichouse.

I think that what has been done by the defendant does not come within the spirit of sub-section (6) of section 5 of the Act. I do not think that anyone reading that sub-section would say that it applied to a case like the present, where there has been a licensed house on the holding open for generations, and during the currency of two statutory terms. The sub-section was, in my opinion, intended to apply to the case of opening a licensed house on the holding for the first time. But the plaintiff says that it is an opening for the first time, because the house had been closed, and a new license granted, which makes the resumption of trading by the defendant a new opening for the sale of intoxicating liquors. I do not think that it does. It was asked during the argument, if the house was burned down and rebuilt, would that be the opening of a house? It could hardly be suggested that it would. Similarly, if there was a slip at Quarter Sessions, which resulted in a new license being granted, and a re-opening, that would not be within the section. But even if the present case comes within the sub-section, it is not, in my opinion, a case in which an injunction should be granted. No injury to the landlord has been proved, and he is in no worse or different position than he was before. It is said by the defendant that the plaintiff is interested as a rival trader because he is the proprietor of a hotel at Port-Salon. I put that aside as nonsense, not deserving of consideration. It seems to me, however, that the plaintiff is attempting to take advantage of what, at most, is a very slight slip, if a slip at all, and one which does not come within the scope of the Act of Parliament. I shall, therefore, refuse the application for an injunction, and dismiss the action, and, of course, with costs. W. L.

S. L. Brown, K.C., Healy, K.C., and *P. S. Walsh,* for the appellant:—

The house ceased to be licensed on the 12th December, 1904.

Appeal. 1905. BARTON v. M'FADDEN.

The license obtained by the defendant was a new license, which the defendant could not use without the consent of the landlord, under sect. 5, sub-sect. 6, of the Land Law Act, 1881, and a Court of Equity will in such case restrain the tenant from selling intoxicating liquors on the premises against the landlord's express wish: *Richardson* v. *Murphy* (1). Even although there is a remedy at law, equity will grant an injunction: *Steele* v. *Tiernan* (2).

Horner, K.C. (with him *Ronan, K.C.*, and *Patton*), for the defendant:—

There was no opening of a publichouse within the meaning of the section. That means opening a publichouse for the first time. Here the license had been in existence for a number of years, and it was only by a slip that the old license lapsed. *Richardson* v. *Murphy* (1) was a case of opening a publichouse for the first time: *German* v. *Chapman* (3).

2. This is a mere condition, and an injunction has never been granted for the breach of a mere condition as distinguished from a covenant. Conditions are of two sorts, conditions in deed and conditions in law: Coke on Littleton, 201 *a*; *Geery* v. *Reason* (4); Bac. Abr., 135. For the breach of some of these statutory conditions an injunction would lie, *e.g.* waste, because it always did lie; but for the breach of other and new conditions created by the section, it was obvious from their nature that an injunction could not lie.

3. There is a complete remedy at law provided by sub-sect. 13 of sect. 5, and an injunction will not be granted where there is another remedy: *Cooper* v. *Whittingham* (5); Hardcastle on Statutes, p. 349; *Durell* v. *Prichard* (6); *The Queen* v. *The County Court Judge of Essex* (7).

(1) [1899] 1 I. R. 248.
(2) 23 L. R. Ir. 583.
(3) 7 Ch. D. 276.
(4) Cro. Car. 128.
(5) 15 Ch. D. 501.
(6) L. R. 1 Ch. 250.
(7) 18 Q. B. D. 707.

Fitz Gibbon, L.J. :—

We find it difficult to see any answer to the plaintiff's claim for an injunction. In an action brought to enforce the observance of a contract relating to the user of land, the remedy by injunction is not more discretionary than a decree for specific performance; and where there is a clear obligation by contract, and a continuing breach, I am not aware that a Court of Equity can refuse an injunction, except for some special reason.

We have here a clear obligation as to the user of the subject-matter of a letting: that user is governed by the contract of letting, and when the party who makes the letting reserves to himself the right to prevent any specified thing from being done without his consent, and it is done in spite of the contract, *prima facie* satisfaction by damages is not enough, so long as the wrong continues, because it would lead only to successive actions. There are cases in which equity can say that damages, instead of a mandatory injunction, are a sufficient remedy; but where there is a continuing breach of a contract which the other party has the right to enforce, that is not a case for damages.

That brings us to the question whether the statutory obligation here is in the nature of a contract. All the statutory conditions of tenancy are of that nature. I can see no difference in principle or practice between a statutory obligation to prevent the opening of a publichouse and a like obligation against opening a quarry or cutting turf.

This is not the case of an estate upon condition, as Mr. Horner contended. The obligation not to open a publichouse is a condition of occupation, governing the user of the demised premises. It cannot make any difference that there was a publichouse on the holding at the time of the letting, because it is impossible to put the construction on the condition that the existence of a publichouse, when the condition first came into force, enabled the tenant to open a new one at any time after the old publichouse had ceased to exist. In *The Ballywalter Case* (1) it was held that the erection of a new building was the erection of a new publichouse.

(1) *Ante*, pp. 74, 83.

Appeal. 1905.

BARTON v. M'FADDEN.

Fitz Gibbon, L.J.

Here the landlord successfully opposed the restoration of the license which had ceased to be operative, and he got the old publichouse shut. After that, the act of opening a new publichouse was just as much a breach of the statutory condition as if there had never been a publichouse on the holding before. It is a clear case for specific performance. We have no discretion to refuse to restrain a user of the land in breach of the statutory covenant upon which the landlord has a right to insist.

We cannot consider whether the landlord's having a neighbouring licensed house of his own was his motive for disliking the defendant's house, nor can we take the value of the license into account. We must grant an injunction against opening, or keeping open, any licensed house on the holding without the landlord's consent.

WALKER, L.J. :—

I think we have no option but to grant the injunction. This is a contract regulating the user of the thing demised. It is a condition inserted by the Legislature in consideration of the tenant getting a perpetual contract.

Mr. Horner relied on the statutory conditions, and brought in the argument of estates founded on condition. But I find conditions translated into contract in other places in the Act of Parliament. Sect. 21 provides that "At the expiration of such existing leases, or of such of them as shall expire within sixty years after the passing of this Act, the lessees, if *bona fide* in occupation of their holdings, shall be deemed to be tenants of present ordinary tenancies from year to year, at the rents *and subject to the conditions of their leases* respectively, so far as such *conditions* are applicable to tenancies from year to year."

Conditions include the covenants and contract in their leases; they are therefore applicable to this agreement regulating the user of the holding.

The landlord objected successfully to the order transferring the license to the defendant; and once he did so, he can subsequently rely on the agreement not to open a publichouse on the holding

without his consent. We have no option but to grant the injunction.

When there is an agreement between the parties, the general rule is that the plaintiff is not left to his remedy by damages.

HOLMES, L.J. :—

If the tenant, instead of applying to have a fair rent fixed, had accepted a lease for a long term of years, containing a covenant not to open on the holding, without the consent of the landlord, any house for the sale of intoxicating drinks, an action like the present might have been brought, and in the events that have happened the only questions that could have been raised therein would be whether the covenant had been broken, and whether an injunction was the proper remedy. I think that, without doubt, these questions would have been answered in the affirmative. It would have been assumed that the parties to the contract were aware that in this country intoxicating drinks can only be sold under a license renewable from year to year in the manner prescribed by statute, and that once the license came to an end, and was not renewed according to the statutory provisions, the right to sell was lost, and could only be recovered by having recourse to the same mode of procedure as applies in the case of a house for which a license is sought for the first time. The King's Bench has held that this was the position of the tenant's premises in this case ; and the moment the house would be re-opened under a new license, the covenant would have been broken. Such a breach of covenant has always been restrained by injunction. An action for damages would be illusory. It would be impossible in most cases to prove any pecuniary loss, and the only mode of preventing a continuous and persistent breach of covenant would be by an action like the present.

I have dealt so far with a contract in a lease executed by the parties. This case is quite as strong, if not stronger. The tenant in his own interest avails himself of a statutory proceeding, which confers on him great advantages, and subjects him to some minute obligations, one of which is to make his contract of tenancy sub-

Appeal. 1905.

BARTON v. M'FADDEN.

Holmes, L.J.

ject to a stipulation identical in terms with the covenant I have mentioned.

Prima facie, the landlord ought to have the same remedy to enforce observance of the stipulations. The only argument *contra* is that, under the Land Acts, the landlord, where a statutory condition is broken, may take proceedings to put an end to the tenancy, and to recover possession of the holding. But there is nothing in these statutes to suggest that this is his sole remedy; and why is he to be deprived of the only effectual means by which the tenant can be obliged to observe his contract?

For these reasons I am of opinion that the appeal ought to be allowed.

Solicitor for the plaintiff: *J. Trew Colquhoun.*
Solicitor for the defendant: *J. Mallins.*

R. D. M.

VANDELEUR *v.* GLYNN AND THE ATTORNEY-GENERAL.

M. R.
1902.
Oct. 29–31.
Nov. 1, 5, 6, 21.

Appeal.
1905.
May 2–5, 11, 12.
June 5.

Foreshore—Patent—User—Admissions—Ex diuturnitate temporis præsumuntur rite acta.

The foreshore may constitute a part of a manor which adjoins the sea, and consequently may pass from the Crown by a grant of the manor, although the technical words to describe it be absent.

When a patent contains words under which foreshore may pass, it may be shown by user that a particular part only of the foreshore passed, although it be clear that other parts did not pass, or although it be left uncertain whether such other parts did or did not pass.

Where a patent, though omitting technical words, contains words under which foreshore may pass, and where there have been proved, affecting part of the foreshore of the manor, several acts of ownership, open, notorious, and long persevered in on the part of the grantee of a manor under a patent, though each of such acts would have been an act of trespass or encroachment if that part of the foreshore had not passed by the patent, the proper course is to attribute all such acts of ownership to a legal origin and not to usurpation, and to hold that such part of the foreshore passed by the patent.

ACTION to establish the plaintiff's right to a quay at Kilrush, and to demand and receive from the defendants, M. Glynn & Sons, reasonable tolls for the use of the quay.

The pleadings, facts, and arguments are sufficiently stated in the judgments of the Master of the Rolls, and of the Lord Chief Baron in the Court of Appeal.

Matheson, K.C., *Matthew J. Bourke, K.C.*, *O'Connor, K.C.*, and *Phelps*, for the plaintiff.

The Solicitor-General (*Campbell, K.C.*), *D. S. Henry, K.C.*, and *G. W. Walker*, for the Attorney-General.

Healy, K.C., *Redmond Barry, K.C.*, and *P. Lynch*, for the defendants, M. Glynn & Sons.

M. R. 1902.

VANDELEUR *v.* GLYNN.

THE MASTER OF THE ROLLS:—

The plaintiff in this case is Hector Stewart Vandeleur, and the defendants are Henry R. Glynn and William Glynn, trading as M. Glynn & Sons, and His Majesty's Attorney-General for Ireland.

The statement of claim alleges that in and prior to the year 1846 the plaintiff's father, Crofton Moore Vandeleur, was seized of and entitled to (amongst other hereditaments in the county of Clare) the manor of Kilrush and the foreshore between high- and low-water mark adjoining the said manor, under Letters Patent of King James the First, dated January 19th, 1621, confirmed by Letters Patent of King Charles the Second, dated September 1st, 1661. That the said foreshore being in its then state incapable of being used for purposes of navigation, Crofton Moore Vandeleur, in exercise of his right of property in the said foreshore, and of the franchises and liberties to which he was entitled under the said Letters Patent (all the estates, interests, franchises and liberties, granted by which were then vested in him), constructed on the said foreshore, in the years 1846 to 1848, a quay and pier for the convenience and benefit of public navigation in the said district. That Crofton Moore Vandeleur expended over £1600 in the building of the said quay, and the same was afterwards maintained and improved by him at his own expense. That from the time of the erection of the said quay he claimed and exercised the right of receiving and thenceforth continuously received reasonable dues or rates from all persons using the quay. That on the death of Crofton Moore Vandeleur, on November 9th, 1881, the plaintiff, as his successor in title, under a settlement of July 13th, 1857, became entitled as tenant for life to the said manor, foreshore, and quay.

The statement of claim then states that the defendants, M. Glynn & Sons, are a firm of millers and ship-owners at Kilrush, and have used the quay ever since it was built, and always, up to the happening of the events hereinafter mentioned, paid Crofton Moore Vandeleur, and the plaintiff or their lessee for the time being, the rates charged for the use of the same; that in the year 1892 the said defendants, having a larger class of steamers than had previously plied to the quay, requested the plaintiff to enlarge

and improve the berths for steamers at the quay, and the plaintiff at considerable expense complied with the said request, and in other respects incurred much outlay in improving the quay. A number of transactions are then stated, showing that these defendants on several occasions disputed the reasonableness of the tolls, and were decreed for the same in the County Court. In the year 1898 the defendants appealed from one of these decrees; and on the hearing of the appeal, for the first time raised a question as to the plaintiff's title to the quay, and his right to claim reasonable tolls for the use of it. Mr. Justice Andrews, however, who heard the appeal, held that the plaintiff had established his title and right, and affirmed the decree. It is then stated that the defendants disregarded this decision, and were sued again in the year 1899 in the County Court; and on this occasion they challenged the plaintiff's title, and objected to the jurisdiction of the County Court, as a question of title was raised; the plaintiff, on the other hand, contended that the defendants were estopped by the previous decrees from questioning the plaintiff's title. The Queen's Bench Division decided, on a case stated, that they were not so estopped, and the Court of Appeal affirmed that decision, and the civil bill was accordingly dismissed without prejudice.

The plaintiff claims:—1. A declaration that he is entitled to the said quay. 2. A declaration that he is entitled to demand and receive from the defendants, M. Glynn & Sons, reasonable rates and charges by way of quayage for the defendants' use of the quay. 3. An account of the moneys due and payable by the said defendants to the plaintiff as rates or quayage, or by way of compensation for the defendants' use of the pier, from December 17th, 1897.

The statement of defence put in by the defendants Glynn traverses the various allegations in the statement of claim. In paragraph 7 they say that they paid to Crofton Moore Vandeleur, and to the plaintiff, the dues or rates mentioned in the statement of claim, in the belief that the pier and quay were the property of Crofton Moore Vandeleur, and, after his death, of the plaintiff, as grantees from the Crown, and the decree mentioned in

M. R. 1902.

VANDELEUR *v.* GLYNN.

the statement of claim was obtained against them on the same footing; that the question of the plaintiff's title to the foreshore and to the pier and quay was first raised as between them and the plaintiff in the course of the proceedings referred to in the statement of claim; but that on June 11th, 1894, the plaintiff brought an action in the Queen's Bench Division against the South Clare Railway Company to enforce his title to (*inter alia*) an adjoining portion of the foreshore, on which the station of the Railway Company was erected, and which, as alleged by the plaintiff, was held by him under the same title, namely, under the settlement of July 13th, 1857, in the statement of claim mentioned, and at the trial the following questions (among others) were left to the jury:—1. Was the part of the lands claimed, on which the defendants' station was erected, the property of the plaintiff? To this question the jury answered, "No." 2. Was it part of the foreshore, and the property of the Crown? *Answer*—"Yes." 3. Was the plaintiff, or those under whom he claimed, in undisputed possession of the place called the Waste for sixty years before the action? *Answer*—"No." The verdict and judgment were accordingly entered for the defendants, and have never been questioned.

There is a further special defence in paragraph 12. They say that "the plaintiff, by means of the said pier and quay, wrongfully covered and obstructed portion of the foreshore, so that it was impossible for these defendants to land or embark persons, goods, wares, and merchandise, on or from the portion so covered and obstructed, and for the same to reach the public road without passing over the said pier and quay, and that they were thereby constrained to use, and did and do use, the pier and quay for the purposes aforesaid, and for no other purpose whatsoever."

The rest of the defences will appear from what I have to say as to the facts of the case.

It thus appears that the claim of the plaintiff in this action is confined to the pier in question, namely, the Commercial Quay at Kilrush; and that, as to it, while claiming it as his property, he only seeks to establish his right to charge reasonable tolls for its use. The Crown challenges his right altogether, and the Messrs. Glynn do likewise, alleging, in addition, that the tolls

sought to be levied by Mr. Vandeleur are unreasonable. At one stage of the case, and having regard to some observations of counsel, it occurred to me that perhaps after all the latter might be deemed to be the real controversy now subsisting between those chiefly interested; and if that had been so, the ascertainment of reasonable tolls might have settled the controversy. Had this been the case, I saw no difficulty in hearing and determining that question, and offered to do so. But when it became apparent that this was not the view of the defendants, and that the real question was as to the plaintiff's title to the place in question, and his right to charge any toll whatever in respect of it, I acquiesced in the propriety of first arriving at a decision on that point, leaving any question as to reasonableness of amount to be afterwards settled by a reference, if necessary, in the ordinary way.

The main question, therefore, is, Has the plaintiff made out his title either under the charter, or by virtue of any presumption of lost grant, to the place on which the quay or pier stands?

As to the question of presuming a lost grant, I may express my view at once. That presumption could only arise if it were the case that the foreshore in question did not pass under the charter of James; for there is no suggestion that, if it did so pass, it was ever regranted to the Crown. If then it did not pass by the charter, I find no reason to hold that it was granted by the Crown by any instrument, actual or fictitious, prior or subsequent to 1621. We know what happened in 1846 when the pier was commenced. The transactions of that time have an important bearing on the other and main question, but they seem to me not to support, but to negative, the idea of lost grant. At any rate, the evidence fails to satisfy me that if those under whom the plaintiff claims were excluded from the foreshore by the patent, they have gained it by any independent title.

Let us come, then, to the title as it appears in the documents. The first is the charter of 1621. This charter, taken as the root of the plaintiff's title, was certainly not the commencement of the Thomond title. The grantee was the 4th Earl. In a very interesting map of Ireland ("Insula non procul ab Anglia, vulgare Hirlandia vocata"), bearing date 1567, and reproduced *in facsimile*

M. R. 1902. VANDELEUR *v.* GLYNN.

in the National MSS. of Ireland, the whole territory now forming the county of Clare is laid down as of the Earl of Thomond. James in effect only confirmed the prior title, though his letters patent do not in terms say so; and the lands are limited to the grantee and the heirs male of his grandfather, Donagh, Earl of Thomond.

The patent comprises a vast number of denominations of land; it grants:—1. The manor, &c., of Bunratty; 2. Moih; 3. Crovreaghane; 4. Half-quarter of Carrowreagh and Manor, &c., of Clonderallagh; 5. Manor of Downam; and then (6) comes Kilrush.

The words of the patent are as follows:—"And further of our more abundant special grace certain knowledge and mere motion with the assent and consent aforesaid we have given and granted, and for us our heirs and successors we do give and grant to our aforesaid cousin Donagh, Earl of Thomond, the Manor of Kilruish, with the appurtenances, and also the five quarters of the land of Kilruish." Then follow other denominations which I need not read; then come these words:—"Also all and singular castles, messuages, tofts, mills, gardens, orchards, yards, lands, meadows, pastures, woods and underwoods, heath and furze, marshes, elder groves, fisheries, fishings, lakes, weirs, and the soil thereof, mines, quarries, and all and singular hereditaments whatsoever, with their appurtenances of every kind whatsoever, of whatsoever kind, nature, or species, they be, or by whatsoever names they are known, called, or distinguished, or whichever were part, parcel, or member of the premises, or any parcel thereof, so heretofore accepted or reputed, placed or occupied, all and singular which are in the county aforesaid."

There is a further reference in this patent to the Manor of Kilruish. It is as follows:—"And also a moiety or half of all and singular goods and chattels of felons, fugitives, felons of themselves, persons outlawed and put 'in exigent,' goods, waifs, estrays, wrecks of the sea, fines, amerciaments and issues in the courts of us, our heirs or successors, forfeited or found to be forfeited, or found, and also all other liberties, privileges, and immunities to our said cousin by the aforesaid indenture or instrument of composition in any manner appointed, limited, or intended,

in or within the aforesaid premises, and in [or within the aforesaid Manors of Downass, otherwise Annaghmore, Killrush, Fyneavara, and Crevraghan in as ample and beneficial manner and form, and as fully, freely, and entirely as by the aforesaid indenture or instrument of composition in any manner is expressed, understood, appointed or intended, and not otherwise."

It is said that it is a grant, *inter alia*, of a moiety of the wreck of the sea, as contrasted with the grant of Bunratty, where the whole of the wreck of the sea was given. I shall refer to this later on.

Then came the troublous times of Charles I. and the Commonwealth; and in 1661 Charles II. made to Henry, then Earl of Thomond, and his heirs, a new patent or confirmation of the same lands (so far as the Manor of Kilrush at least is concerned), reciting an inquisition of office as if after a forfeiture, and the title of the King was so found. The language of the two patents is, in relation to Kilruish, practically identical. The important point is that whilst using very general words, neither patent expressly mentions foreshore, or refers to low-water mark as a boundary.

In 1749 the ancestor of the plaintiff, in consideration of a sum of £9826, obtained a grant from the then representative of the Thomond family, of, *inter alia*, the Manor of Kilrush in fee; and ever since the possession has gone under that title. The estate has been settled and resettled from time to time. The plaintiff, Hector Stewart Vandeleur, on the death of his father, Crofton Moore Vandeleur, in 1881, became tenant for life. Crofton Moore Vandeleur was himself tenant for life under a settlement of 1830. It is not necessary to go into the various dealings with the property by settlements, fines, and recoveries. This part of the title to Kilrush Manor, though included in a general pleading denial of the plaintiff's right to sue, was not challenged by the defendants in Court, and was conclusively proved by the proper documentary evidence. A more perfect title, short of a Landed Estates Court grant, could not well be found, to whatever was the Manor of Kilrush, as comprised in the patents of James and Charles.

But the foreshore between high- and low-water mark, *prima*

M. R. 1902.

VANDELEUR v. GLYNN.

facie, belongs to the Crown; and the *onus* lies upon a subject claiming any exclusive rights over it to show his title, by grant or prescription. The case was rested on the former; for, though prescription was referred to, it was not the case made, nor could it well be.

Now, there is no express gift of foreshore *eo nomine*, nor of anything in terms only applicable to it. But foreshore may pass by a grant which does not specifically mention it. There are no separate words in the patents, which might not be satisfied without granting any foreshore whatever. No doubt the parcels are described in very wide and general terms; and the circumstances of the country, and particularly of this wild remote district of Clare, might favour the idea that the Crown would probably not be very solicitous of retaining its rights in the barren foreshore, when granting away all the substance of the estates. The islands near the coast are specially included in the patents. No different rule of law, however, can be applied to this grant from that which prevails in other cases, and the question is, How is the patent as it stands to be interpreted?

The rule is now well settled that a Crown grant of a manor on the sea-coast does not *prima facie* include foreshore not specifically mentioned; but that user of the foreshore as of right, and as if it had been mentioned, may be relied on as evidence that it was intended to pass by, and was included in, the grant as parcel of the manor; and, further, that acts of modern user may be effectual for this purpose. Mr. Taylor says in his great work on Evidence:—"So a series of acts of ownership exercised on the seashore by the adjoining proprietor will afford *abundant* evidence for a jury to presume that the Crown formerly granted the soil to one of his ancestors." Part i., chap. v., sect. 130. The case of the *Duke of Beaufort* v. *Mayor of Swansea* (1), and in particular the judgment of Parke, B., in that case, makes this quite clear. That learned Judge says:—"I am of the same opinion. I think the learned Judge was perfectly correct in all he said to the jury upon this subject. This is a grant, in the time of King John, of Terra de Gower. It does not purport to create for the first time a new

(1) 3 Ex. 413.

manor or franchise, but to convey whatever belonged to the Terra de Gower at that time. The word 'terra' may embrace, as appears from the authorities cited by Mr. James, as much as the word 'manor' may. The authorities are clear that the seashore may be parcel of the manor; as such it was taken by Lord Hale, and by Lord Coke in *Sir Henry Constable's Case*. In Hargrave's Law Tracts, page 12, he gives the same rule, that, in point of practice, the seashore is taken and treated as part of the adjoining manor. By a grant of the manor everything would pass which is parcel of the manor. The only question is whether, it being uncertain how much constituted the Terra de Gower at the time in the reign of King John, modern usage may be made use of as evidence to show what was comprised within the limits of the manor; that is, what was the boundary of the manor both upon the land side and sea side. Unquestionably, if evidence may be given to show what was the boundary of the manor upon the sea side, the evidence here shows that, in point of fact, the manor in the hands of the Crown, and possibly, in the hands of a subject before, was actually bounded by the then line of demarcation, namely, the low-water mark. All modern usage to that effect is evidence to show what was the meaning of the grant. I have no doubt that all ancient documents, where a question arises as to what passed by a particular grant, can be explained by modern usage. I think the jury were properly instructed in this case to inquire, from modern usage, whether the limit of the Terra de Gower was or was not the low-water mark of the seashore."

The principle of this and similar decisions is not confined to manors, but has been extended or rather applied when the grant is not of a manor, although certain seigniorial rights attach to a manor as such which are not involved in a mere grant of lands (see *Brew* v. *Haren* (1)). This distinction, however, even if causing any difference, does not arise here; and the general rule as laid down in *Duke of Beaufort* v. *Swansea* (2) is not disputed by the Crown.

I have then to consider what is the evidence of acts of user in

(1) I. R. 9 C. L. 29; I. R. 11 C. L. 198. (2) 3 Ex. 413.

M. R. 1902.

VANDELEUR v. GLYNN.

this case. Of these, the most important and cogent would seem to be such as concern the very *locus in quo* itself, that is, the site of the pier, or quay; next, such as concern the part of the foreshore adjoining and in the vicinity of the pier; and then such as concern other parts of the foreshore of the manor of Kilrush.

The present pier was constructed or commenced in 1846, at the expense of the late Crofton Moore Vandeleur, tenant for life of the estate, and cost some £1600. Living memory, no doubt, may go further back than that; but it is a long time since. The pier unquestionably stands upon foreshore, and is altogether above low-water mark, though now there is sometimes a little water at the foot of the pier. The land behind it inland is part of the manor, and was and is in the undisputed possession of the Vandeleurs, save a part stated to have been acquired since by the West Clare Railway Company. From the time of its construction the predecessor of the plaintiff, and the plaintiff himself, have always used and maintained the pier, charging tolls for its use, appointing harbour-masters from time to time, and making leases of the tolls, until the recent refusal of the defendants Glynn to pay the toll; first, on the ground that the amount was unreasonable; and, afterwards, on a denial of the plaintiff's title to any toll, which denial was founded on, or at least suggested (he says so himself), by Mr. Glynn's failure to understand the words "*prima facie*" contained in a letter dated 8th October, 1898, from a gentleman in the Quit Rent Office. [The MASTER OF THE ROLLS read the letter.]

Until the last few years no one attempted to question the title of the plaintiff's family. Everyone using the quay (and all the public who had occasion to do so used it) paid toll for it. The defendants, Messrs. Glynn, used it more largely than anyone else, and always paid for it. They asked the plaintiff to improve the accommodation it afforded, on the ground of increasing trade of the place and the greater size of their vessels which resorted to it, and there is some evidence of his having spent money in accordance with that request. Recognition of title could not be more consistent and complete, extending over somewhere about half a century; for though the Mr. Glynn who appeared before me is a comparatively young man, his firm used the pier from its inception.

Still, his acts do not bind the Crown or the public, and indeed were not relied on as an estoppel.

But the Solicitor-General relies upon the special circumstances attending the construction of the pier as displacing any inference which might otherwise arise of ownership by the Vandeleurs, and these circumstances deserve careful consideration.

In 1846 the state of Ireland caused anxiety to all conditions of people, and shortly culminated in the famine. It was the concern of the owners of estates in Ireland who, from every motive of interest and humanity, desired to help their tenants to tide over that terrible epoch. Parliament, too, was beginning to be alive to the needs of the famishing people; and passed a series of four Acts, the first four of the Session, enabling public money to be advanced on terms, and spent on public works in Ireland. One of these Acts, 9 Vict. c. 3, is entitled:—"An Act to encourage the Sea Fisheries of Ireland, by promoting and aiding with grants of public money the construction of piers, harbours, and other works." The preamble is full, as is usual in statutes of that date. It recites that it is necessary for the encouragement and promotion of the deep sea fisheries of Ireland as a source of employment and food to provide funds, partly by way of grant, and partly by way of loan, for the construction or repair of small harbours, piers, quays, and landing places, and other works in connexion therewith, or of a like nature, and to establish a system whereby the co-operation of parties interested may be obtained for securing the repayment (by instalments or otherwise) of such portion of such funds as shall be advanced by means of loan for the said purposes, and that it is expedient, with a view to prevent delay and expense as to inquiry into the titles of and incumbrances upon the estates of parties interested in or benefited by such works, to define and declare the mode in which the repayment of such sum or sums so lent shall be secured, and that it is expedient that provision be made for the repair, maintenance, or improvement of such small harbours, piers, quays, and landing places, and other such works as at present exist, which may be useful for fisheries, or which have been wholly or in part constructed with public money advanced for the purpose of the improvement of the fisheries of Ireland, and for the maintenance of which there are now no specific funds.

M. R. 1902. VANDELEUR v. GLYNN.

Section 1 then makes the Commissioners of Public Works Commissioners for the execution of the Act. Section 3 provides that it shall be lawful for the Commissioners for the execution of this Act (*i.e.* the Commissioners of Public Works), by and with the consent and approbation of the Commissioners of Her Majesty's Treasury, for the purpose of this Act, to make advances by way of grant to an amount not exceeding in the whole the sum of fifty thousand pounds, and for the said Commissioners of Her Majesty's Treasury to cause to be issued from time to time as they may find necessary, out of the growing produce of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, any sum or sums not exceeding in the whole the said sum of fifty thousand pounds, to be applied to the purposes of this Act in the manner and on the conditions hereinafter mentioned and specified concerning the same.

Section 4 prescribes the conditions of such grants. First—That any such grants may be used for constructing, erecting, or making, reconstructing, repairing, or improving, on or near the sea-coast of Ireland, such small harbours, piers, quays, landing slips and places, and roads of approach thereto, respectively, and such navigable cuts through shoals, or for connecting adjacent bays, or inlets, and such engines, beacons, or small harbour-lights, and other works of a like nature respectively as the said Commissioners shall deem necessary or useful for the encouragement and promotion of the sea fisheries of Ireland. Second—That such works shall be executed, constructed, maintained, and kept in repair by and under the direction of the said Commissioners for the execution of this Act, and such works shall, with any lands purchased or acquired under the provisions of this Act, be deemed and taken to be public property, and be for that purpose absolutely vested in the said Commissioners and their successors. Third—That any grant for any one such work shall not exceed in the whole the sum of five thousand pounds. Fourth—That the amount of any such grant shall not exceed three-fourths of the total actual cost of any such work, and that such grant shall be made only upon the conditions that the repayment of the residue of the total cost of such work, with interest, shall be secured, or agreed to be secured by the county, district, or proprietors of lands which or who, as

hereinafter directed, ought, in the opinion of the said Commissioners, to provide for securing the same.

Section 6 provides for application by memorial for the execution of the works, and is as follows:—"It shall and may be lawful for any person residing, or being proprietor or occupier of land in any district or place adjacent to the sea-coast of Ireland to apply by memorial to the said Commissioners, stating the advantage of, or the necessity for, the construction of any such work as aforesaid, or the improvement of any such existing work as aforesaid, and praying that such district or place may be examined, and such works, or such other works in lieu thereof, as the Commissioners shall deem fit, may be executed under this Act, and by such memorial undertaking, in the event of any such works, or other works in lieu thereof, not being duly approved of or proceeded with by the said Commissioners, to defray the expenses of any preliminary survey and examination which may be requisite; and the said Commissioners shall cause to be entered in a book to be by them for that purpose provided a list of all such applications as shall be made to them by memorial as aforesaid, with the particulars of each case, and the principal proceedings therein."

Section 33 prescribed the form of conveyance to be executed to the Commissioners.

Section 63 provides that all works constructed, altered, repaired, or improved under the provisions of this Act shall be vested in the said Commissioners and their successors, and shall be maintained, sustained, upheld, and repaired by the said Commissioners out of any tolls, rates, or rents, which, under the provisions of this Act, shall accrue to the said Commissioners for or in respect of such works, or the lands purchased by or vested in the said Commissioners.

Section 65 empowers the Commissioners to levy for the use of such pier, harbour, quay, landing place, engine, or other work such tolls and rates as the Commissioners of Her Majesty's Treasury shall from time to time approve, provided that the amount of such tolls and rates shall not exceed the probable average annual expense of maintaining such pier, harbour, quay, or other work.

Mr. Vandeleur, the plaintiff's father, desired to construct the new pier, and thereby both give employment to a number of workmen

M. R. 1902. VANDELEUR *v.* GLYNN.

and labourers, and also benefit the town of Kilrush, his own property, and he was anxious to avail himself of the machinery afforded by the Act just passed to obtain an advance of money. Accordingly he applied for a loan, little caring, perhaps, whether the soil of the slob on which the pier was to be built was to be called his or not, if he got the money and was entitled to a reasonable return for it, and if his object of benefiting the people and town of Kilrush was attained.

He, accordingly, applied for a loan of £600, stating that the object would require £1200, whereof he would himself give £600. The loan was agreed to, and £260 was actually advanced by the Treasury. Had nothing else occurred, the whole of the £600 would, no doubt, have been advanced; and on the completion of the pier, &c., the provisions of sect. 4, sub-sect. 2, of the Act would have applied, including the words "shall . . . be . . . vested . . . in the said Commissioners." This vesting would have been by conveyances (see sections 32, 33, &c.), and no doubt if only a conveyance had been wanting, the plaintiff could not have relied on that defect, for he would have been bound to cure it. But what are the facts? Having spent the £260, and far more, on the works, Mr. Crofton Moore Vandeleur applied to the Government, stating that he had himself spent in these, which were really relief works, £1600, and proposing to refund the £260, and it was accordingly refunded by him, and accepted by the Treasury; and the proceedings under the Act came to an end.

I am not quite sure that I have accurately appreciated the way in which the Solicitor-General relied on this transaction; whether as proof that the pier, &c., had, under the Act, vested in the Commissioners and still remain so vested, or as an admission that the title was not in the Vandeleurs at all. If the former (and I am sure it is my fault if any doubt is possible as to the contention), I can see no ground whatever for holding that what occurred did vest the property. The plaintiff's predecessor, who was only tenant for life, would, no doubt, have been bound, had things gone on as originally intended, to concur in vesting all his interest, and it may be that of his successors in title, in the public authority. But the matter stopped; and the repayment of the

£260 simply cancelled the proceeding, and annulled its consequences, leaving both parties to it *in statu quo*. The Act was not framed to decide questions of title to foreshore or otherwise (as I pointed out by reference to the preamble), and does not contain one word from which it is to be assumed that an owner, applying for a loan, admits that he is not entitled to the foreshore. No such question was mooted. No vesting took place. The works were not "executed, constructed, maintained, or kept in repair," under the Commissioners. The whole thing was inchoate, and before completion determined. The £260 of public money, part of a fixed sum provided by Parliament for the construction of piers, was replaced and restored to the Fisheries Fund, when it became available, and probably was employed, for the purposes of the Act as if it had not been advanced. On the other hand, Mr. Vandeleur himself made and finished the pier, and used it as his own, without interference or challenge by the Crown, or anyone else, for half a century. If it had vested in the Commissioners, they would have been entitled to the tolls for all those years. He and his lessees fixed the rate of tolls; had them printed from time to time; posted them up on the pier, and otherwise notified them; charged them uniformly; sued for, and recovered them when in arrear, during fifty years. During these fifty years (the books for a great part of the time, surprisingly well kept, are forthcoming, and are produced) the Glynns paid almost weekly; and the Crown never interfered till the Commissioners of Woods and Forests discovered, in 1896, that, *prima facie*, the Crown is the owner of foreshore.

And Kilrush in the nineteenth and twentieth centuries was not the Kilrush of King James's time; for the *town* had come to be a place of 4000 inhabitants; and there were, and are, Custom House buildings, coast-guards, and police there, and, of recent times, steamers to and from Limerick, and a railway. There is now not only postal but telegraphic communication with Dublin (where there are Boards enough for ordinary practical purposes); and I doubt not that there are and were during all those years persons acquainted with the *prima facie* rights of the Crown, representing the public, and bound to look after them; and had it been supposed that Mr. Vandeleur was for half a century

M. R. 1902.

VANDELEUR v. GLYNN.

openly, and under claim of right, violating the law, setting the right of the Crown at defiance, and pocketing its money, he would have been brought to account for it. Even in this present proceeding the Crown is not plaintiff but defendant.

I pass by for the present the occurrences of quite recent date in reference to the tolls in question and the plaintiff's disputes with the Railway Company, and come to consider the evidence of acts of ownership by the plaintiff and his predecessors in other parts of the Kilrush foreshore.

As regards the Sand Quay, part of it is covered by the Commercial Quay, namely, the part to the north-east. For reasons which I expressed during the argument, I attach small importance to the evidence relating to it. It was formerly used as a landing-place for boats and other small craft carrying sand or gravel, and it was so used before the construction of the Commercial Quay in 1846. There is no evidence that it was owned by anyone, or that there was any user of it except by the license of whoever owned it, and it is undoubtedly owned by the Vandeleurs, at least above high-water mark. It was not a case of adverse possession; and even if the public did use it as of right, such user would be consistent with Vandeleur's ownership of the foreshore, since he could only hold subject to the public rights. The contention put forward was not sustainable in law or in fact.

First, then, I take the Custom House Pier, because it is on the creek of Kilrush, the nearest point to the Commercial Pier, and in fact almost adjoins it.

By lease, dated the 15th September, 1806, made between John Ormsby Vandeleur, of the first part; Lord Castlecoote and six others (including the said Right Honorable John Ormsby Vandeleur), Chief Commissioners of His Majesty's Customs and Port Duties of Ireland, second part; and one Boyle Vandeleur, Collector of Ennis and Clare, third part; John Ormsby Vandeleur demised to Boyle Vandeleur for 900 years, at the yearly rent of £20, "All that and those that piece or parcel of ground situate lying and being at Kilrush in the County of Clare, bounded on the north by the road leading from Kilrush to the pier of Kilrush, on the east by ground in the possession of the said John Ormsby

Vandeleur, on the west by ground in the possession of Mr. Studdert, and on the south by the river extending in front to the said road 100 feet or thereabouts, be the same more or less, as by a map or terchart hereunto annexed may appear."

The lease contains the following declaration of trust by the lessee:—"And the said Boyle Vandeleur doth hereby, for himself, his executors, administrators, and assigns, acknowledge and declare that this present demise is made to and accepted by him in trust and to and for the use of His Majesty King George the Third, his heirs and successors, and that he, the said Boyle Vandeleur, his executors, administrators, or assigns, shall and will, when required for that purpose, make, do, and execute, any deed or deeds that shall be deemed necessary for the better declaring the trust aforesaid."

On the site so demised Customs buildings were erected and the Customs Quay, in part at any rate, stands. The premises have been ever since occupied for the public service apparently till 1849, and since then by the assignees of the Crown; and the rent has been and is regularly paid from 1806 to the present day. If the demise comprised foreshore, I do not think it is possible to conceive a stronger act of ownership by Vandeleur, or a clearer admission of title by the Crown. Indeed so strongly was this felt by the advisers of the Crown, in this part of the case, that their whole efforts were directed to show that the lease does not include any part of the foreshore of the creek of Kilrush; and that the Customs Pier, which admittedly stands in part upon land forming portion of the foreshore, is really built upon a site held by the Crown under two titles, viz.: that under the lease, and that which was before the lease vested in the Crown by virtue of its prerogative.

It will be remembered that in the lease only one measurement is given; that is, the frontage to the road which formed the northern or inland boundary is 100 feet or thereabouts. The frontage to the road was, perhaps, looked upon and measured as being the most valuable if not the only really valuable part. The southern boundary is "the river." I shall refer to the map presently.

In 1849 (12th December), Charles William Scovell, of the

M. R. 1902.

VANDELEUR v. GLYNN.

Custom House, London, Secretary to the Commissioners of Her Majesty's Customs, sub-demised the premises at a pepper-corn rent in consideration of £150 for the residue of the term short by a month to the Messrs. Russell, of Limerick. The parcels are the same as in the lease of 1806, and described in the same words, with this addition, "and also all that building standing and being upon the said piece or parcel of ground known as the Custom House, at Kilrush, aforesaid." This lease also has a map endorsed, showing the lands, but not the Custom House, which then stood upon it. Now, if there be any ambiguity on the face of the lease or map of 1806, plainly the lease and map of 1849 may be appealed to in explanation; for the latter is the act of the Crown, dealing with the very same premises, neither more nor less, which were comprised in the lease of 1805, on which the Custom House had in the meantime been built. The later instrument thus contains the Crown's own interpretation of the former.

What, then, is shown on the map of 1806? The south boundary is not stated to be "foreshore in the ownership or occupation of the Crown," as might have been expected, had the Crown considered that it was owner of the foreshore, but simply the river. I think no one, looking at the map, knowing only what we know of the place, would doubt for a moment that it included foreshore, shown by the part covered with dots, and that it was bounded by the stream which flows down the centre of the creek, and which lies under low-water mark. The Solicitor-General, however, points out that the width of the ground at the north is 100 feet, as appears to be by the body of the lease and by the map; and that on the same scale, the distance on the map of the road from the river (north to south) would be only 200 feet or thereabouts, so that the boundary at the river must be not low-water but high-water mark, because the limit of low water is far more than 200 feet from the road. But the effect of this argument depends upon the assumption that the map or terchart is made to scale. It is, however, not made to scale; because if the "river" as depicted were intended for high-water mark, then the distance from the road as shown on the map is far greater than it is in reality; 200 feet instead of 100 feet or so, as shown on the maps

proved by the surveyors, and without objection or dispute, put in evidence, so that no certain scale is observed, and none is professed to be. Mr. Caldwell, C.E., said it presented to him, as an engineer, the appearance of being a sort of sketch or plan, rather than an accurate map; and I think this is the real fact, for the only measurement given is that of the landward frontage.

But coming to the map of 1849, there is really no room for doubt as to its meaning. Its general contour is the same as that of the map on the lease of 1806; but it shows clearly the foreshore as something marked off from the rest; and the river, defined by fixed boundaries on both sides, cannot possibly mean the whole of the slob at Kilrush, and can only indicate the channel of the narrow stream in the centre of it, which is always covered with water even when the tide recedes. If the map were to be taken as made to scale, the width of the "river" at the place in question would not be more than about 20 or 30 feet, and could not by any stretch of imagination be intended to cover the whole of the creek below high-water mark. Besides this, that which, in the map of 1806, was an undefined space covered with dots, is, in 1849, laid down much more distinctly, and marked out in a way that can only refer to foreshore, for there is no other physical feature which it could be intended to represent.

Thus we have the most remarkable evidence I remember to have seen of acts of ownership exercised over foreshore, by means of an actual demise by a subject to the Crown, followed by a sub-demise by the Crown, in consideration of a money payment, of the very same foreshore, sub-demised by no other title than that which had been derived from its own lease from the subject.

Immediately adjoining this Custom House Quay is the Paupers' Quay, also standing in part on foreshore. This has been held and managed by the Vandeleurs, who have received rent and tolls for it without interruption.

Many of the observations I have made as to the Custom House Quay apply with at least equal force to the Paupers' Quay; and I heard no answer to the plaintiff's case in respect of it, save that, even assuming that the plaintiff's predecessors had acquired title to it by any means, that did not confer any title to the site of the Merchants' Quay. This is certainly true, but does not affect the

M. R. 1902.

VANDELEUR *v.* GLYNN.

weight of the evidence as establishing ownership over part of the same foreshore.

The patent slip at Cappagh is situate on the other side of the creek, and further down towards the River Shannon than the Commercial Pier. But it stands on part of the foreshore, and leases and agreements are in evidence showing in the clearest way that the Vandeleurs, from 1835, dealt with the foreshore there as their property. It was leased down "to low-water mark" in express terms. No doubt the lease of 1835 was surrendered for want of title; and £1320 paid by the lessor, Vandeleur, to the lessee, Spaight, for his expenditure; but this was *not* for want of title to the foreshore which was demised, but for want of a leasing power to grant a ninety-nine years' lease, and the Vandeleurs made the pier and completed it on the foreshore.

Besides all this evidence of acts of ownership on parts of the foreshore, not remote from the Commercial Quay, the plaintiff has proved an enormous number of dealings in periods extending over three quarters of a century with other portions of the Kilrush foreshore, unexampled, so far as I know, in number and quality—leases granting the foreshore; prosecutions and convictions for trespass on it; fair rent lettings based upon the tenant's rights to the sand and seaweed of the foreshore; whole bundles and sheaves of all these are in proof. Besides these, there is a vast number of leases made to tenants, "excepting and reserving" to the Vandeleurs the beach between high- and low-water mark. No doubt these last are of less value than demises of the foreshore, for the tenants could not under them use the foreshore, and thus complete an act of ownership. And it would be straining the meaning of the documents to hold that they were meant as strict common law reservations, that is, re-grants of it. But the exceptions and reservations are "to the lessor," &c., and it is plain that the parties to these instruments claimed on the one hand, and recognised on the other, the right of the lessor. And further, the lessor let the rights of seaweed, &c., in the same places to the same or other tenants, and prosecuted and convicted others who tried to take the seaweed without his authority.

But the Solicitor-General says all these acts, so far as they are proved, are mere acts of usurpation, not alone not shown to be

justified by the charter, but shown by the terms of the charter to be illegal. In other words, the charter expressly excludes the foreshore.

This contention was based upon the undoubted fact that King James's Charter (followed by that of Charles II.) grants not the wreck of the sea, but only a moiety of the wreck, in Kilrush. This point was pressed with more vigour than I should have supposed applicable to it.

The right to wreck is a franchise, an incorporeal hereditament, not necessarily connected with the foreshore. Each may subsist in a different owner. And when the Crown asserts that the grant of a moiety of the wreck negatives the hypothesis on which the plaintiff's case rests, *i.e.* a grant of the entire foreshore, it asserts that which is contrary to law, viz. that the foreshore and the right to wreck must be co-extensive. They need not even be co-existent. No doubt the grant of wreck has often been held to help the construction of a patent, as being inclusive of foreshore, just as grants of weirs, fisheries, and the like are called in aid for that purpose. But the plaintiff's case is here apart from any grant of wreck; and it appears from the patent itself that one-half of the Crown's right to wreck had been otherwise dealt with. It is not of wreck alone that a moiety is granted, but of fines, forfeitures, &c., as well, while in Bunratty the whole of these franchises is conveyed. The moiety in Kilrush would seem to have been dealt with by an instrument of composition prior to the patent.

Thus, I can have no doubt that, had this case been tried in 1898, the plaintiff's title must have been held to be proved by the most conclusive evidence ever known in a case of the kind; that is, in a case where the foreshore has not been in terms granted.

But the defendants rely on what has happened in more recent years, not as taking away from the plaintiff a right previously his, nor as precluding him by estoppel from alleging the truth as to his title, but rather as evidence that he never had any title at all. In considering the effect of these transactions certain considerations must be borne in mind as affecting the position of the plaintiff. He was the owner of Kilrush, and interested in its

M. R. 1902.

VANDELEUR v. GLYNN.

prosperity. He probably attached very little importance to the ownership of the beach, save where it was useful, as for a quay or pier, or for the service of his tenants (sand and seaweed). He was as a landowner interested in the opening up of the place by railways. He was, I am sure, very imperfectly acquainted with the particulars of his title, and during four and a half years he was (as he called it) "campaigned" (we all know what that means), and obliged to live away from his own estate.

Poulnasherry Bay, though remote from the creek of Kilrush, is on one side of it at least part of the manor; that is, the part above high-water mark. As to the part of it below high-water mark, the title down to low-water mark depends upon the patent. Below that, and over the portion of the soil always covered, the title of the Crown is, of course, clear. A projected railway, under an Act of 1860, was so contrived that the construction of the line would render easy the reclamation of a considerable tract of slob-land, partly foreshore, partly below low-water mark, and partly (it may be) held under another title. The Act contained a provision that the Company might reclaim the slob, paying £1200 therefor to the Crown, and a recital that the Crown "was or claimed to be" entitled to the soil of the said estuary. That the Crown was entitled to part of the soil of the said estuary, there is no doubt. That the late Mr. Vandeleur did not put forward a claim to even a part of it, is equally clear.

I daresay he did not prize his rights in Poulnasherry very highly; and he was very anxious to have the railway. He may have surmised, also, that the Crown would never see a penny of the £1200 (as was the case); or he may have known nothing about the matter, save in a general way. To act with strict regularity, he ought to have petitioned about this slob, which never had brought him in any profit, instructed counsel and solicitors, and appeared in committee, and applied for a clause, spending £400 or £500 in establishing a claim which he might have known was not worth sixpence if sustained. Some of these Clare reclamations (I knew of one a great many years ago) have, I believe, turned out disappointingly, to say the least. Suffice it to say, however, that this Act (1860) does not purport to decide

any title; and that if it did, it would only apply to Poulnasherry and not to Kilrush Creek. And if an Act of Parliament, which is omnipotent, did deprive the Vandeleurs of property which was theirs, no more is to be said. In the present case, it is very doubtful whether it did.

The railway was not constructed for many years afterwards. It was completed under an Order in Council confirmed by statute (53 & 54 Vict. c. ccx., 1890), and some time about 1890 the Railway Company, having laid down a line of rail upon a portion of the landward side (N.) of the Commercial Quay, proceeded to take a further portion where a goods shed is placed. This the plaintiff considered to be an unauthorized invasion of his rights; and he tried to stop it by force; a foolish, ill-advised proceeding, and, I take leave to say, a bad example in the county of Clare. He failed in this attempt; and then brought an action of ejectment on the title, claiming the place as his. With another defence, the Company pleaded that they were in possession, thus throwing the *onus* of proving his title upon the plaintiff. He went to trial. The moment it appeared that the *locus* was in reality foreshore, the presumption of ownership in the Crown arose; and the plaintiff, not being prepared to negative that presumption, the jury found, properly, for the defendants. Why the plaintiff ever went to trial on such a record without having his proofs prepared as they are in this case, it puzzles one to comprehend; but so it is, and it appears that he did not produce his patent or go into evidence of title at all. No new trial was asked for; and as there was neither surprise (in a legal sense) nor newly discovered evidence, a new trial would not have been granted. There is the finding on which a verdict was entered for the defendant; but it does not extend further than the premises to which it relates. It is no *estoppel* at least any further than that; and while it may be that the plaintiff has by great neglect conclusively lost his right to the precise part of the foreshore actually involved, I cannot allow that to conclude him as to other portions of his property.

Then come his dealings and litigations with the defendants Glynn. The latter disputed the reasonableness of the tolls charged, in amount, but not the plaintiff's right, or the right of his lessee, to charge reasonable tolls. They were processed, and a decree for

M. R. 1902.

VANDELEUR v. GLYNN.

£25 10*s.* 8*d.*, including costs, was obtained against them on 5th June, 1894, by Taylor. The schedule of tolls was revised in 1896; another refusal by the defendants to pay on the same grounds; civil bill and decree; appeal and confirmation. Further civil bills and case stated on a law point for the Court of Appeal in 1898; the jurisdiction being there held to be ousted by reason of a claim of title, then first advanced.

But a correspondence and certain interviews with the officials of the Board of Trade were relied on by the defendants as conclusive against the plaintiff, that is, as deliberate admissions of his want of title. If they amounted to that, the inheritance would remain unbound; for plaintiff is only tenant for life. Holding, as I do, that before these occurrences the title was clear, it must be shown that it was afterwards lost; and no doubt admissions are very good evidence. But what do these supposed admissions amount to? Vandeleur was hard pressed by the enemy. He had no doubt "run away," as the Solicitor-General said, from the task of proving his title, dreading the expense, as he well might. But he wanted his tolls. There was a large arrear due by Glynn, with whom the dispute was only as to amount. He did not care about any question of title to foreshore, if he got his tolls, and the quay established; he was willing to submit the question of reasonableness to the Board of Trade. Glynn professed to be likewise so willing. The officials of the Crown were disposed to claim the foreshore; but willing to part with the right to it, at the place in question, for a nominal payment, obtaining of course the benefit of the acknowledgment by the plaintiff. The affair could only be carried through on that basis by means of a Provisional Order for extending and improving the pier.

Accordingly, plaintiff and defendant, Glynn, met at the Woods and Forests Office, Whitehall, with Mr. Stafford Howard, one of the heads of that department, who made a suggestion as to a Provisional Order. It was at once agreed to, and both parties left on good terms, Vandeleur believing, as he well might, that no question remained save the reasonableness of the tolls, and the project of increasing the pier by means of an advance. When the inquiry was held by the Board of Trade, plaintiff having agreed to accept a title from the Crown, Glynn appeared in several

different capacities, and the Provisional Order came to nought. This conduct of the defendant was characterized by counsel as almost treacherous. Without going quite so far, it was, I think, unfair, and I might almost call it sharp practice. Vandeleur had been led into seeming to admit the title of the Crown, and to incur expense on the faith of the representation that only a question of amount of tolls was in dispute; and then Glynn, suddenly and without warning, having so far entrapped his opponent, turns on him and destroys the whole arrangement. It was an unpleasant business, and one into which I am surprised that a man of position, intelligence, and education, as Mr. Glynn is (although he says he does not know what "*prima facie*" means), should have deviated.

But does all this conclude the plaintiff by admissions? His willingness to take a grant of some slob from the Crown on which to construct the addition to the pier was a weak thing; but it is to be remembered that the price to be paid was to be nominal; an advance of money would be made for the works, and the right to tolls would be for ever set at rest, and all disputes with Glynn finally determined. Supposing that this is an admission, it is surely one qualified by all the circumstances which surround it; and, indeed, it is but the expression of a willingness to submit to give up something without debate to secure a reciprocal concession, first promised and then refused.

But compare it with the admissions by the Crown. It was never acted on. What of the leases? What of the payment of rent for half a century by the Crown and its lessees in Custom House Quay and Cappagh? As to the Glynns, the case is too clear for argument on this question of admissions. Indeed, if the evidence had been a little clearer on the point of the expenditure made by the plaintiff in improving the Quay at the request of the Glynns, their position would have been, on that ground, very nearly that of a person estopped by matter *in pais*, on the *Pickard* v. *Sears* (1) doctrine.

I hold that the plaintiff is entitled to succeed, and must have judgment accordingly.

(1) 6 Ad. & Ell. 469.

Appeal. 1905.

VANDELEUR v. GLYNN.

May 2–5, 11, 12.

June 5.

The Attorney-General and the defendants, Glynn & Son, appealed to the Court of Appeal (Lord Ashbourne, C., Palles, C.B., Fitz Gibbon, Walker, and Holmes, L.JJ.).

The Solicitor-General (*J. H. M. Campbell, K.C.*), *D. S. Henry, K.C.*, and *G. W. Walker*, for the Attorney-General.

Healy, K.C., *Redmond Barry, K.C.*, and *Poole*, for the other defendants.

Matheson, K.C., *Matthew J. Bourke, K.C.*, and *Phelps*, for the plaintiffs.

The judgment of the Court was delivered by—

PALLES, C.B.:—

June 5.

This action comes before us upon two appeals, one by the Attorney-General, and the other by the defendants Glynn, from a decree of the Master of the Rolls, which declares the plaintiff entitled to a certain quay in the creek of Kilrush (which during the argument has been called "The Merchants' Quay") and the portion of the foreshore on which it stands; and further declares the plaintiff entitled to receive from the defendants, the Glynns, reasonable rates or charges by way of quayage for the said defendants' use of the said quay.

The plaintiff rests his title to the portion of the foreshore in question upon two patents: one of the 18th of James the First, to Donough, Earl of Thomond; and the other, of the 13th of Charles the Second, to Henry, Earl of Thomond. So far as is material to the question before us, the language of these two patents is identical. It will, therefore, be sufficient to refer to the first only, merely observing that the second is a patent of confirmation.

Amongst the subjects granted by the first patent are: "The Manor of Killruish with the appurtenances, . . . and also four quarters of the land of Killruish, three quarters and one quarter-mere of the land of Termon Effriory, and three quarters of land and one third part of one quarter of the lands called Ballynoad, Kippagh, and Inishbegg, one quarter and one-third part of a quarter of the land of Ballymacrenan, . . ." with large general words, including "all and singular . . . *fisheries, fishings*, lakes, *weirs, and the soil thereof* . . . and all . . . hereditaments whatsoever

Appeal 1905. VANDELEUR *v.* GLYNN. Palles, C.B.

with their appurtenances of every kind whatsoever . . . or by whatsoever names they are known, reputed, or understood, or which at any time heretofore were so accepted or *reputed*, placed, or occupied *as part*, parcel, or member *of the premises*, or any parcel thereof." By the same patent the King also granted to the same Donough, Earl of Thomond, and his heirs, that "the aforesaid manor of Killruish, and all and singular the premises and things above granted following the mention of the aforesaid manor of Killruish may be held reputed and styled the manor of Killruish."

The patent also contains a grant (upon which some argument has been rested by the Solicitor-General), viz., a grant to the Earl of certain royalties, including "wreck of the sea," within certain manors, not including Killruish, and one moiety of the same royalties within the last-mentioned manor.

Finally, there is a clause that the Letters Patent shall not extend to any hereditaments theretofore granted by the King to any person other than the Earl of Thomond or other persons whose estates the Earl then possessed, and that if any parcel of the premises thereby granted in fee-simple were by any previous patent mentioned to be granted in fee to the Earl or to any of his ancestors whose heir he was, the then grant thereof should be void. I mention this latter clause, as it shows that this patent also operates largely by way of confirmation.

The creek of Kilrush, which runs from the town of that name to the Shannon in a south-westerly direction, is bounded upon the north-west, so far down as the foreshore now in controversy, by lands which on the Ordnance Map are called "Kilrush," and from thence by lands marked on the Ordnance Map "Leadmore," but which are admitted to have been formerly known as one of the quarters of Kilrush. These lands of Leadmore extend along the creek to its entrance into the Shannon, and thence along the Shannon towards the sea for about three-quarters of a mile, where they meet the lands of Carrowncarra, which are also part of the lands granted by the patent. The south-eastern boundary of the creek, consists throughout its entire length, from the town of Kilrush up to and beyond its junction with the Shannon, of the lands of Cappagh, which are admitted to be the "Kippagh" mentioned

in the patent. Next adjoining, and higher up the Shannon than Cappagh, are Ballynoat and Ballymacrinna—the "Ballynoad" and "Ballymacrenan" mentioned in the patent. The tide ebbs and flows along all the lands I have mentioned.

There are some matters of law relating to the effect of such a patent as this, which are so well settled that it is unnecessary to do more than state them.

It is common learning that foreshore *may* constitute a part of a manor which adjoins the sea, and consequently may pass from the Crown by the grant of such a manor, although the technical words to describe it, *littus maris*, be absent. Whether under any particular patent which contains the grant of such a manor, the foreshore in fact passed, depends upon whether such foreshore was part of the manor—a matter which may be shown by user—and which, indeed usually (in this country at least), cannot be shown otherwise than by user.

It is further settled, in this country by the decision of the Judges in the former Courts of Exchequer and Exchequer Chamber, in *Brew* v. *Haren* (1) (which on this point was unanimous), that the foreshore opposite a particular denomination of land may pass from the Crown by a grant of such denomination, accompanied by such general words as occur in the patent here. In such a case, as in the case of the grant of a manor, whether the foreshore passes or does not pass, depends upon whether it was in fact part of the denomination in question, a matter to be shown by user. The grant in that case was of, *inter alia*, "the town and lands of Barnagrosse, . . . and also all and singular lands . . . and all other hereditaments whatsoever of what nature or kind soever to the aforesaid premises . . . belonging incident or appertaining or *accepted, reputed or known as part, parcel, or member* of the premises, or any part thereof, or *with the said premises*, or any part or parts thereof, used, occupied, or enjoyed."

It has also been held by the Court of Appeal in England in *The Attorney-General* v. *The Corporation of Portsmouth* (which is not reported, but the printed judgment in which has been furnished to us by the courtesy of the Attorney-General), that the foreshore opposite a town may pass from the Crown by the grant

(1) I. R. 9 C. L. 29; I. R. 11 C. L. 198.

Appeal. 1905. VANDELEUR v. GLYNN. Palles, C.B.

of the "town," provided it be determined, on the true construction of the patent, that its effect was to grant lands, and not merely to create a municipality. This decision goes the full length of *Brew* v. *Haren* (1), because if the foreshore passed only on the assumption that "town," as there used, included land, it is a decision that the foreshore passed from the Crown under a grant, by reason of its being construed to be a grant of land.

Lastly, it would seem to follow from the above, that, as of several denominations of land which, before the time of memory, were erected into a manor, some, but some only, might have included foreshore, the foreshore of part of the lands within a manor may be parcel of it, whilst that of other lands within the manor may be in the Crown. The decision in *The Attorney-General* v. *Portsmouth* (2) is a clear authority that this doctrine is applicable to a town. It was there held that the foreshore opposite part of the lands constituting the town of Portsmouth was included in the patent, and passed thereby to the Corporation, whilst the foreshore opposite the other parts of the lands granted by the same patent did not pass thereby.

To the same effect is a passage in the judgment of FitzGibbon, L.J., in *Hamilton* v. *The Attorney-General* (3), where he says:—"I would observe, in answer to the argument so closely pressed at the bar—that our decision would equally apply to the foreshore of every parcel of land included in this most comprehensive patent which happened to adjoin the sea—that no such conclusion follows."

From the foregoing, I deduce this, which either is, or, in my opinion, ought to be accepted as, undoubted law, that in a case such as the present, where the patent contains words under which foreshore *may* pass, it may be shown by user that a particular part only of the foreshore passed, although it be clear that other parts did not pass, or although it be left uncertain whether such other parts did or did not pass. This is no more than I have always understood to be the rule, tersely stated by Lord Wensleydale in the well-known case of the *Duke of Beaufort* v. *Mayor of Swansea* (4), where he says:—"I have no doubt that all ancient

(1) I. R. 9 C. L. 29; I. R. 11 C. L. [198.
(2) Not reported.
(3) 9 L. R. Ir. 298.
(4) 3 Exch. 413.

documents, when a question arises *as to what passed* by a particular grant, may be explained by modern user." This, in my view, always involves a part and parcel question: what is the thing, *in rerum natura*, which at the time of the grant answered the description of the subject-matter thereby granted? If this be the law in reference to all patents, with how much more force must it not apply in the present case, where the patent operates largely by way of confirmation, and was not intended to pass anything of which the patentee was not already possessed? If the foreshore were, as in order that it should pass by the patent it must have been, previously vested in the Earl, why should it require express words in the patent to pass it, as the origin of the necessity of such express words in grants from the Crown is the assumption that the subject-matter was in the Crown by virtue of its prerogatives.

It may be that I ought not to have discussed this question so fully. I have done so, as I think it due to the Solicitor-General to state in some little detail the reason why I am unable to agree in the contention which he pressed upon us with so much earnestness, and which to so large an extent formed the basis of his argument, that if he showed that the foreshore in Poulnasherry, or the foreshore abutting upon any one part of the lands granted by the patent, did not pass thereby, it followed *as matter of law* that no other part of the foreshore could have passed thereunder.

It will, however, of course be understood that I do not doubt for a moment that an act of ownership on one part of a foreshore may be *evidence* of a title to the entire. So long as it is treated as evidence only, it involves a decision of *fact*. What I venture to insist upon is matter of *law*, viz.—that the legal effect of the foreshore opposite part of the lands of a manor not having passed by a patent does not necessarily prevent other parts of the foreshore from passing thereby.

The Solicitor-General has also argued that the legal effect of the grant of the *franchise* of "wreck" within the manor being limited to one moiety is to prevent any part of the foreshore from passing thereby.

I am as unable to follow this argument as was the Master of the Rolls. The only reasonable deduction from the grant being

Appeal. 1905. VANDELEUR v. GLYNN. Palles, C.B.

confined to a moiety only of the several franchises is that the entire of those franchises within the manor had been previously granted by the Crown to a subject, and had become vested in two as co-parceners, and that the estate therein of one only of the co-parceners had become vested in the Earl. This assumption, however, involves this, that the entire franchise of "wreck" had been granted by and passed out of the Crown; and for the purpose of the question here it is immaterial *to whom* it was granted, for there is no shadow of evidence that, if once granted away, it ever revested in the Crown.

So far, then, from this grant of a moiety of "wreck" being conclusive in favour of the Crown, as the Solicitor-General has argued, I hold it to be substantive evidence in favour of the plaintiff to the same extent as would have been a grant of the entirety. The reason which Lord Hale gives for his statement, that one having "wreck of the sea" *infra manerium* affords a *great presumption* that the shore is part of the manor, viz. that otherwise he could not have it, was held in *Dickens* v. *Shaw* (1) not to be strictly accurate, but still it never has been doubted that it is a circumstance which, with others, may be evidence of title to the foreshore. In the case I have mentioned, Holroyd, J., says:—"I think it *may* be evidence of ownership, particularly if coupled with other acts of enjoyment of the right to the soil."

Having premised so much, I limit my decision to the plaintiff's title to the *locus in quo* actually in dispute, the Merchants' Quay in the creek of Kilrush. That alone is the subject-matter of the plaintiff's claim—alone the subject-matter of the Master of the Rolls' actual judgment. I admit that, to determine this, I cannot decline to take into consideration the acts relied upon by the Crown in relation to Poulnasherry, to the portions of the foreshore conveyed by the Crown to the South Clare Railway Company, to the portion taken possession of by that Company without apparent title, or to the Cappagh pier. These acts can no more be left out of consideration than can the user by the plaintiff and his predecessors in title of the shore of Leadmore, Carrowncarra, and Ballymacrenan. But if, giving due weight to the acts relied on by the Crown, and notwithstanding them, I am convinced, by the

(1) Hall on Seashore, 2nd ed., App. xvi.

user of the entire, that, at least, the foreshore in Kilrush Creek passed by the patent, then, in my view, I am bound to affirm the decree here, although, perhaps, I may not have arrived at an actual conclusion upon the more difficult question of the title to the foreshore in Poulnasherry. Whether I have, or have not, arrived at a conclusion upon the latter point, it would serve no useful purpose to state.

Viewing the question for decision in this light, the acts of user of the foreshore of the creek naturally carry much greater weight than those relating to other parts of the foreshore, and those I shall consider in more detail than the others. But, just as I cannot reject the acts of user of other places relied upon by the Crown, so neither can I ignore such user in other places as is relied upon by the plaintiff. As this part of the case has been hardly, if at all, discussed by the counsel for the Attorney-General, I do not think it necessary to refer in detail to the parol evidence, or to the old leases which are in evidence. Those leases I have been enabled, through the courtesy of Mr. Phelps, the plaintiff's junior counsel, and Messrs. Hallowes & Hamilton, the solicitors for the Attorney-General, to examine carefully. Fifty-four of them are in evidence, of which twenty relate to Leadmore, twenty-one to Ballymacrenan, and some few to Carrowncarra. Fifty-two of them are dated upwards of eighty years ago. Many of them were executed in the eighteenth century. Naturally, their language varies much. Some grant "shore," which, as used in them, plainly bears its usual meaning of "foreshore." Others reserve it to the lessor. Some few reserve "wreck." Some grant a right to seaweed to the tenant; others grant it to a person not a tenant, on foreshore in possession of a tenant. But, whatever be their language, no one can study them as a whole, as I have done, without being satisfied that, during the long period which they cover, the user of the foreshore was of the same character as the parol evidence and the fair rent orders prove it to have continued to be in the subsequent period, so far back as living memory extends, viz., as the exclusive property of the plaintiff's ancestors and of himself.

Of weight also is the patent of March, 1795 (35 Geo. III.), which recites an inquisition made under a writ of *ad quod damnum*,

Appeal 1905.

VANDELEUR *v.* GLYNN.

Palles, C.B.

to inquire what damage would be caused by a ferry which Colonel Crofton Vandeleur sought to establish between the lands of Cairnmogue and Cahirmaculla, also mentioned in the patent, "over that part of the sea called the Oyster Cove, where a ferry-boat hath plied for some years past," and further recites that it appeared by said inquisition "that the proposed *landing-places* on each side of the Oyster Cove belong to the said Crofton Vandeleur." These landing-places must necessarily have been below high-water mark.

The Solicitor-General has urged that but little weight should be attributed to these fair rent lettings, as being secret documents, which could not be known to the Crown; but my experience of the Irish tenant convinces me that, when the subject-matter of a demise to him includes a right of user of the foreshore which is taken into consideration (as it must be by the Land Commission), as an element in fixing the rent, he will in fact exercise that right. Thus the weight to be attached to these documents is not merely that they are acts of assertion of ownership by the plaintiff; I deduce from them the actual continued and persistent user by the tenants of the right mentioned in the orders. I believe that the user of those parts of the foreshore must have been so open and notorious that it is impossible that it could not have been known to those representing the Crown, and responsible for the protection of its rights.

I now come to the creek of Kilrush. There were in this creek three quays, in addition to that in dispute, the Paupers' Quay, the Patent Slip, and the Custom House Quay.

The Paupers' Quay is built upon part of the foreshore of the creek which was demised by lease of the 20th June, 1805, by the Right Hon. John Ormsby Vandeleur, to Thomas Studdert and Hugh Crawford. The parcels demised appear by the memorial to have been "the two plots of ground, Nos. 1 and 2, adjoining to each other, and as particularly described in a map thereof unto said lease annexed, *being part of* and situate near *the creek of Kilrush*, in the county of Clare, said plot No. 1 containing in front, opposite to said creek, from east to west, 150 feet, and in depth, from north to south, 240 feet; and said plot No. 2 containing in front to said creek, from east to west, 150 feet, and in depth, from

north to south 360 feet, and also all . . . *that part of the shore or strand of said creek* in front of said plot No. 2, containing from east to west 150, *and from high-water mark in and towards the channel of said Creek*, so far as the public pier now extends, with liberty for said Thomas Studdert and Hugh Crawford . . . to erect and build on said part of said *shore or strand* for their own use a pier or quay, provided such pier, or quay, shall not extend *further from high-water mark towards the channel of said creek* than that the front of such pier to the south shall be in or form a right line with the front of the public pier, and also that part of the shore or strand of said creek in front to the south of part of said plot No. 1, commencing from the east side of the public pier and containing, from east to west, 111 feet *and from high-water mark in and towards the channel of said creek from north to south* 30 *feet* with liberty for the said Thomas Studdert and Hugh Crawford . . . to erect and build on said part of said shore, a quay, or pier, for their own use, provided such quay, or pier, shall not extend *from high-water mark towards the channel of said creek more than* 30 *feet*. To hold . . . for 999 years . . . subject to the yearly rent of £15."

Michael Shannon (question 344, *et seq.*) remembers this quay being in the occupation of the representatives of the Studderts, and proves payment of the rent under the lease. He also proves that £300 was paid to the representatives of the lessee in 1874 by Colonel Vandeleur; the latter went into possession of the quay probably under an eviction. From that time till 1891 Colonel Vandeleur himself was in possession until it was demised to one M'Auliffe, by lease of 31st December, 1891. The lessees, or their representatives, are still in possession under this lease. The lease, which was executed long *ante litem motam*, contained a map which was of considerable assistance in locating these various piers.

This one fact, so clearly proved that its correctness is admitted by the Crown—the erection, under the authority of the ancestor of Mr. Vandeleur, of a pier, beyond all doubt, extending below high-water mark, used and enjoyed as private property for a period of substantially 100 years—is evidence in the plaintiff's favour, of which it is impossible to exaggerate the weight.

Next, as to the Patent Slip. This is near the Coast-guard

Appeal. 1905. VANDELEUR *v.* GLYNN. Palles, C.B.

Station at Cappagh. Its origin is a written proposal by Mr. Francis Spaight, accepted by the late Colonel Vandeleur on 25th July, 1835. By this document Mr. Spaight proposes to take certain lands, at the yearly rent of five guineas, for a lease of 999 years or for ever, "with a right to the *shore* all round these premises to *low-water*." The proposal then contains an engagement to erect on these premises, within twelve months, a patent slip of the best construction, capable of receiving two ships of 400 tons each.

This transaction is one not to be lightly discounted. It involved the expenditure of a large sum of money. It was a matter not between ignorant persons, but between, on the one side, a gentleman whose ancestors undoubtedly claimed a title to the foreshore as lords of the manor, and, on the other, a business man, willing to invest considerable capital upon the security of that title. We know from the subsequent deed of the 13th February, 1838, that Mr. Spaight did in fact expend £1320 5*s.* upon the erection of the Patent Slip, and that it having been afterwards found that the leasing power of Colonel Vandeleur did not extend to so long a term as 999 years, Colonel Vandeleur accepted a surrender of the lease, repaying Mr. Spaight the £1320 5*s.* he had expended, and giving him an additional sum of £300 as compensation for the loss of the lease. This pier has been enjoyed as private property from 1835 to the present time—a period of seventy years—enjoyed as private property to the knowledge of the Coast-guards and other Government officials of the town of Kilrush.

As to the third, the Custom House Quay, the circumstances in connexion with it are even more important. It appears by a lease of the 15th September, 1806, which has been produced from the Auditor-General's collection, and to which the then Commissioners of Customs are executing parties, that the Right Hon. John Ormsby Vandeleur demised to Boyle Vandeleur (the then Collector of Customs for Ennis and Clare) in trust for His Majesty King George the Third, his heirs and successors, for 999 years, at the yearly rent of £20, certain premiums which are described as "All that and those that piece or parcel of ground situate . . . at Kilrush in the County of Clare bounded on

the north by the road leading from Kilrush to the pier of Kilrush, on the east by ground in the possession of the said John Ormsby Vandeleur, on the west by ground in the possession of Mr. Studdert, and on the south by the river extending in front to the road 100 feet or thereabouts, be the same more or less, as by a map or chart hereunto annexed may appear."

On the site thus demised, customs-buildings were erected, and the Customs Quay, in part at any rate, now stands, and that quay undoubtedly extends below high-water mark. These premises were occupied for the public service until the year 1849, and since then by the assignees of the Crown; and the rent has been regularly paid from the date of the lease till the present time. The Master of the Rolls in his judgment says, and I entirely concur in the observation:—"If this comprised foreshore, I do not think it is possible to conceive a stronger act of ownership by Vandeleur, or a clearer admission of title by the Crown."

I have, therefore, to determine whether this lease did in fact demise foreshore. The case for the Crown as to this is that it does not, and that the site of the Customs Quay is held by the Crown, as to part only, under the lease, and as to the residue, viz. that part between high- and low-water mark, under its prerogative title. Much of the controversy on this appeal has been as to this portion of the case, and I must deal with it somewhat in detail. I must confess that I am unable to decide it solely from the terms of the instrument itself. The map upon the lease appears to me to be consistent with either alternative, either with the demised premises containing, or excluding, the foreshore in question. The southern boundary, "the river," I think should *prima facie* mean the river at high water, and thus exclude from the demise the foreshore in question. The dotted portion at the end of the map is, to my mind, equally consistent with the part so represented being either foreshore or the part of the land above high-water mark, which is covered with shingle. As to the measurement from north to south which appears upon the map, I am not quite satisfied of the exact position of the road described in the lease as leading from Kilrush to the pier of Kilrush, which is the northern boundary from which those 200 feet are to be measured; nor having regard

Appeal. 1905. VANDELEUR v. GLYNN. Palles, C.B.

to the fact that the breadth from east to west of the premises, 100 feet, is stated in the body of the lease, while the length from north to south is omitted therefrom, and cannot be gathered from the map without an assumption that it is made to scale—an assumption that I am not prepared to make. The opinion at which I have arrived, that the parcels in the lease of 1806 do contain the entire of the site upon which the Customs Quay was erected, including that part which is foreshore, is founded, not upon the terms of the lease itself, but upon it taken in connexion with two subsequent instruments to which the Commissioners of Customs were parties, and which demonstrate this circumstance in a remarkable manner. I refer to the two leases of 12th December, 1849, and 27th June, 1853, from the Custom House authorities to Mr. Russell. We know, from the second of those leases, that an agreement was entered into on the 28th of December, 1848, between Mr. Russell and Mr. Scovell, the then Secretary to the Commissioners of Customs, whereby Mr. Scovell, in consideration of £150, and of Mr. Russell and his partners accepting a lease, and covenanting to pay the rent of £20 reserved by the lease of 15th September, 1806, and keeping all other covenants therein contained, and paying taxes and repairing, and delivering up the premises at the end of the term in good condition, agreed to demise for 950 years, from the 1st May, 1848, "all those premises known as the Custom House at Kilrush, with the use of the crane and quay adjoining the said premises, being 100 feet in width on the sideabutting upon the road from Kilrush to the pier."

For the purpose of carrying out this agreement, a lease of the 12th December, 1849, was executed, Mr. Scovell being the party of the first part, the Commissioners of Customs of the second part, and Mr. Russell of the third part. It was executed not only by Mr. Scovell, but by Mr. Goulburn and Mr. Spring Rice, two of the Commissioners of Customs, and in this lease the description of the premises demised to the Russells is as follows:—"That piece or parcel of ground . . . bounded on the north by the road leading from Kilrush to the pier of Kilrush, on the east by ground in the possession of Colonel Vandeleur, on the west by ground in the possession of Mr. Studdert, and on the south by the river" (a description practically identical with the first part of that in the

lease of 1806), and then proceeds :—"Also all the building standing and being upon the said piece or parcel of ground known as the Custom House at Kilrush aforesaid." The description then resumes that in the lease of 1806, proceeding with the words "extending in front to the road 100 feet or thereabouts be the same more or less as by a map or terchart hereunto annexed may appear." Later on I shall refer to the map. At present it is sufficient to say that the Custom House being built upon that piece of ground, this lease of 1849 did not purport to demise anything save the premises included in the lease of 1806 ; but as the agreement of December, 1848, shows that it was intended to include the quay in the lease, the description is persuasive evidence that the quay was then held under the lease of 1806, as otherwise the lease would not have carried out the agreement in pursuance of which it was made.

But the case does not rest there, because attention was afterwards directed to two errors in the lease of the 12th December, 1849, not in themselves material to the matter in question here, otherwise than as being the occasion of the execution of the second lease, that of the 27th June, 1853. It was discovered that the lease did not contain a covenant by Russell that it should have contained, and it was further found that Scovell's term was only 947 years, instead of the 956 years for which he had granted them to Russell. In consequence of these errors, it was determined that the lease of 1849 should be surrendered, and a new lease granted. Accordingly, the lease of 27th June, 1853, was executed. It is made between William Maclean, the then Secretary to the Commissioners of Customs, of the first part; the Commissioners themselves, of the second part ; and the Russells, of the third part. The execution of it by the Secretary to the Commissioners of Customs is witnessed by a Mr. Hopper, who described himself as "Conveyancing Clerk, H. M. Customs, London." It is apparent that it was considered to be rather a special instrument, and doubtlessly was prepared with care; and not the less so because its object was to rectify the errors in the previous instrument. It recites the lease of the 15th September, 1806, and the agreement of 28th December, 1848 ; and further recites that the lease of 12th December, 1849, was executed in pursuance of that

Appeal. 1905. VANDELEUR v. GLYNN. Palles, C.B.

last-mentioned agreement; and then it proceeds to demise to the Russells "All that piece or parcel of ground situate lying and being at Kilrush in the county of Clare, bounded on the north by the road leading from Kilrush to the pier of Kilrush, on the east by ground in the possession of John Ormsby Vandeleur, on the west by ground in the possession of Mr. Studdert, and on the south by the river."

So far, this is part of the description in the lease of 1806. Then it proceeds: "And also all that building standing and being upon the said piece or parcel of ground known as the Custom House at Kilrush aforesaid." These words are merely officious. They do no more than describe the building erected upon the previously-mentioned lands, and then the description again takes up that of the lease of 1806, and proceeds: "Extending in front to the road 100 feet or thereabouts, be the same more or less, and more particularly delineated and described in the plan thereof drawn in the margin of these presents."

Putting out of consideration for a moment the map on this lease, as I did that on the lease of 1849 (as I wish to deal with them together), I am of opinion that nothing is described in these parcels save the premises demised by the lease of 1806; and thus we have, for the second time, in a well-considered document, executed by the Commissioners of Customs (and undoubtedly approved of by their legal advisers), a demise, by the same description as that in the lease of 1806, of lands which undoubtedly contained the quay and part of the foreshore.

I have now to refer to the map on these two leases. I cannot describe that of 1849 better than in the words of the Master of the Rolls:—

"Coming to the map of 1849, there is really no room for doubt as to its meaning. Its general contour is the same as that on the map on the lease of 1806; but it shows clearly the foreshore as something marked off from the rest; and the river, defined by fixed boundaries on both sides, cannot properly mean the whole of the slob at Kilrush, and can only indicate the channel of the narrow stream in the centre of it which is always covered with water, even when the tide recedes. If the map were to be taken as made to scale, the width of the 'river' at the

place in question would not be more than about 20 or 30 feet, and could not, by any stretch of imagination, be intended to cover the whole of the creek below high-water mark. Besides this, that which in the map of 1806 was an undefined space covered with dots, is, in 1849, laid down much more distinctly, and marked out in a way that can only refer to foreshore, for there is no other physical feature which it could be intended to represent."

The map on the lease of 1853 is not quite so strong in favour of the plaintiff, as in it the second line marking out the river is omitted; but the two must be taken together in determining the subject-matter of the lease of 1806, and so taking them I agree with the Master of the Rolls that that lease includes foreshore, and that such a lease to the Crown by virtue of which it erected a quay upon that foreshore, and sub-demised it, in consideration of a money payment, under the title derived from its own lease from a subject, forms a most important piece of evidence against the Crown.

With the knowledge I have acquired of the acts of ownership of this creek, exercised by the plaintiff and his predecessors in title, and those claiming through them, by the erection and maintenance of the Paupers' Quay, the Patent Slip, and the Customs Quay, I come more closely to the matter here in dispute. The present pier, known as Merchants' Quay, was erected in 1846, at the sole expense of the late Colonel Vandeleur. From that time he and his successor, the plaintiff, have always used and maintained it, charged tolls for its use, according to a schedule publicly exhibited, and appointed a harbour-master to regulate its use, without an attempt to question the title of the Vandeleurs to it, until the year 1898, a period of fifty-two years. It is strange, too, how the question as to title first arose. For many years, the present defendants, the Messrs. Glynn, paid tolls for the use of this pier. In 1893 a difference appears to have arisen between them and Mr. Vandeleur, not in relation to the latter's title to the pier, but as to the accommodation he was prepared to allow to the steamers of the Glynns, and as to the reasonableness of the tolls he exacted. In connexion with this dispute, the Glynns appear to have had occasion to communicate with the officials of the Quit Rent Office, and Mr. Henry Glynn appears, by his answer, No. 642, to have

Appeal. 1905. VANDELEUR v GLYNN. Palles, C.B.

asked the officials of that office whether the plaintiff had any right to this quay, and was told by them that he had not; I fear that in that answer is to be found the origin of this unfortunate and most expensive litigation. However, we have fifty-two years' undisputed possession of this quay, which, coupled with the use of the other quays I have referred to, constitutes a case against the Crown of no ordinary magnitude.

I now come to the circumstances under which this pier was erected by Colonel Vandeleur, which naturally are much relied on by the Crown. Early in 1846, in the middle of the famine time, an Act of Parliament, 9 Vict. c. 3, was passed "to encourage the sea-fisheries of Ireland by promoting and aiding with grants of public money the construction of piers, harbours, and other works." It recites that it was necessary for the encouragement and promotion of the deep-sea fisheries of Ireland, and as a source of employment, to provide funds, partly by way of grant, and partly by way of loan, for the construction or repair of small harbours, piers, and landing-places, and other works in connexion therewith of a like nature; and it empowered the grant of public money for constructing such works on or near the sea-coast of Ireland, upon the conditions mentioned in the 4th section. These conditions were, *inter alia*—

2. That the works should be executed and kept in repair by the Commissioners for Public Works, and should be deemed and taken to be public property, and be for that purpose absolutely vested in the commissioners and their successors.

4. That the amount of the grant should not exceed three-fourths of the total actual cost of the work, and should be made only upon the condition that the repayment of the residue of the cost, with interest, should be secured by the county district, or proprietors of lands which ought, in the opinion of the commissioners, to provide for securing it.

This Act was passed on the 5th March, 1846. Later on in the same month Colonel Vandeleur applied to the Board of Works for a grant under that Act in aid of extending the quay wall, from the bridge of the Custom House in the creek; and on the 4th April, 1846, the Treasury sanctioned a grant of £600 for this

work under the conditions laid down in the Act, the remainder of the expense of the work, to the amount of £600, to be contributed by Colonel Vandeleur. Upon the 25th of April Colonel Vandeleur lodged to the Board's credit £300, which was acknowledged by the Board as "being the amount of your private contribution towards the improvement of Kilrush harbour."

Some payments were made by the Board of Works on account of the work to a contractor, Richard Drew, in whose name it appears Colonel Vandeleur himself did the work.

In March, 1849, Colonel Vandeleur applied to the Board of Works that the contract which he took for the execution of the work (I suppose the contract in the name of Drew) might be cancelled by the Board, giving as his reason that he had already, in giving employment to the poor in that locality in the execution of this work, paid a sum far in excess of the £1,200, what he had estimated as the costs of the piers.

On the 27th March, 1849, the Secretary of the Board of Works wrote to the Secretary of the Treasury forwarding a copy of Colonel Vandeleur's letter, and adding: "Colonel Vandeleur is the proprietor of the town, and has already *expended a large sum in improving the harbour*; and the Commissioners therefore desire me to request that you will move the Lords Commissioners of Her Majesty's Treasury to authorize them to cancel the contract in question on Colonel Vandeleur paying back the portion, £260, which has been already advanced to him out of the grant on account of his contract for the works executed."

This application was acceded to by the Treasury; and upon the 30th April, 1849, the sum of £260, being the excess of the sum expended by the Board of Works, above that actually paid in by Colonel Vandeleur, was lodged by him to the credit of the Commissioners, and the contract was thus cancelled.

In determining the nature of this act of the erection of the part of this pier which was actually erected (for that contemplated in the application of March, 1846, was never completed), we cannot leave out of consideration the fact that it was originally intended that it should be executed under the Act of 1846, and thus become public property. Had it been so executed, it would

Appeal. 1905. VANDELEUR *v.* GLYNN. Palles, C.B.

have been on the condition that half of the expense should be contributed by the Treasury. This was not done. The entire expense was borne by Colonel Vandeleur, and the officials of the Crown were plainly aware that he claimed the right of "improving the harbour," in the character which the Secretary of the Board of Works styled "the proprietor of the town," but which more technically was that of "Lord of the Manor." These officials must have been aware that he afterwards used this quay as if it were his own private property, and exacted tolls for its use. Upon the whole, although, in my opinion, the circumstances of its erection to some extent discount its value as an act of ownership, I am of opinion that the true nature of the transaction of 1849 was that Colonel Vandeleur, as the Lord of the Manor of Kilrush, having expended large sums in improving the harbour, claimed to be relieved from the position in which he found himself by reason of his application under the Act of 1846, and to be placed in the position he would have occupied if that application had never been made; that the Treasury, which represents the Crown, acceded to that view, and upon the strength of it accepted the sum of £260. The true effect of this was, in my opinion, to relegate Mr. Vandeleur to his rights, as if the application under the Act of 1846 had not been made.

To the various acts of ownership I have already mentioned, I shall now add but one; the building by Colonel Vandeleur of the sea-wall at Cappagh—an act open and notorious, and which could be justified only by his being the proprietor of the foreshore upon which it was erected.

Now, had we nothing more than the acts which I have already mentioned, what inference ought we to draw from them? The learned Solicitor-General says that all and each of them were acts of trespass and encroachment; and, undoubtedly, so would each of them have been had not this foreshore passed by the patent. But is this the inference we ought to draw, or are we to have regard to the maxim, "*Ex diuturnitate temporis omnia præsumuntur rite esse acta*," and attribute, as we plainly can, all these acts, so long persevered in, so open and notorious, to a legal origin? It is a maxim of our law not to presume illegality. The presumption is the other way, and any user or course of conduct which has been persevered in for a

considerable time—for a time far less than that covered by the user here—*ought* to be attributed to a legal origin, where, under the circumstances of the case, a legal origin is possible, as in this case it undoubtedly is. Viewing the various acts of the Vandeleurs for the last 100 years, without regard to the acts relied on by the Crown, which I shall afterwards mention, I conceive that we would shake the foundations of property, were we to attribute them to usurpation; and I should have arrived at the same conclusion even had I not been satisfied that the lease of 1806 to the Commissioners of Customs comprised foreshore. But taking that fact into consideration, I conceive that, were there nothing else in the case, it would be one which would be unarguable for the Crown.

I now come to the affirmative acts relied upon by the Crown. They are five:—(1) The erection of Cappagh Pier. (2) The local Acts relating to Poulnasherry. (3) The conveyance of the 17th September, 1891, from the Board of Trade to the South Clare Railway Company. (4) The judgment of the 2nd November, 1896, obtained by the South Clare Railway Company against the present plaintiff, in reference to a piece of foreshore which is near the railway-station. (5) The alleged admissions by the plaintiff of the title of the Crown in the negotiations for the Provisional Order.

(1) The erection, or extension, of the Cappagh Pier appears to me to be a neutral fact. Its erection was authorised by the Shannon Navigation Acts (5 & 6 Wm. 4, c. 57) without the consent of the owner of the foreshore. The inquisition of the 15th November, 1837 (2 & 3 Vict. c. 61), states that the part of the bed of the river required for the work was "reputed to be in the possession of Crofton Moore Vandeleur, Esq., his undertenants and assigns." The value of the small piece of land thus required was found to be five shillings—a sum which was lodged in the Court of Chancery; and it cannot be taken to derogate from his title that Colonel Vandeleur, who (as appears from the records produced from the office of the Board) was anxious for the execution of the work, was willing to subscribe to the consequent expense, and who afterwards was assessed to and paid one quarter of the total amount, declined to apply to the Court of Chancery for this

Appeal. 1905. VANDELEUR *v.* GLYNN. Palles, C.B.

five shillings. Nor does it seem to be material that the old pier at Cappagh, prior to its extension under the above-mentioned Acts, was called the Revenue pier, when we have no evidence as to who was the person who built it.

There is one matter in relation to this pier that does, I think, operate *pro tanto* against the plaintiff's claim, I mean the demand and receipt by Colonel Vandeleur and the plaintiff of tolls for the use of the extended pier. The fact that Colonel Vandeleur was taxed to the extent of one quarter of the expenses, and his claim to the old unextended pier, may *account* for this demand, but they do not *justify* it (see 2 & 3 Vict. c. 51, s. 48). The right to take tolls for it was vested, not in the Vandeleurs, but in the Commissioners; and of course it is open to the Crown to say that this receipt without title may colour and affect the receipt which has been so much relied on of the other tolls. I can only say that I have taken this circumstance into consideration in determining the weight of the evidence.

(2) The Poulnasherry Acts have been relied upon in two ways: first, as an admission by Colonel Vandeleur of the title of the Crown to the part of the foreshore of Poulnasherry which is within the manor of Kilrush; and, secondly, as acts of ownership by the Crown. In my opinion they are capable of being used only in the second mode. I am of opinion that, in the events which have happened, they have not divested any estate which the plaintiff otherwise would have had in that foreshore, and I should have been of the same opinion even had the events happened which, by section 48, are made conditions precedent to the slob lands vesting in the Company. It is not necessary for me to actually decide the effect of the 69th section of the original Act, but at present I entertain a strong opinion that, having regard to the Act being a local one, the language of which must be taken to be that of the promoters, and the general construction of which must be consistent with the principle that Parliament does not take away the property of individuals without providing compensation, the words "in the manors adjoining or contiguous to any part or parts of the said waste lands hereby authorised to be reclaimed as aforesaid" must be construed so as to include the manor of Kilrush.

I admit that the claim of the Crown to be paid £1200 as

representing its interest in these slob lands is an act of ownership, and perhaps one of weight; but I must remember that the promoters of such an Act are at the mercy of the Crown officials, and that the Act could not have reached the committee stage without the consent of those officials. Colonel Vandeleur, the then tenant for life of the manor, was not one of the promoters, and any agreement entered into by those promoters to pay £1200 to the Crown, in respect of a claim afterwards shown to be unfounded, could not affect him.

However, apart from questions of strict law, and coming to the position of Colonel Vandeleur, who, although not a promoter, was no doubt interested in the success of the scheme, as one likely to improve the town of Kilrush, I act upon my own experience that the particular provisions of these local Acts are seldom known to the general public. I do not believe that Colonel Vandeleur ever knew or believed that the Act of Parliament contained or involved a claim on the part of the Crown to the foreshore of his manor, or that if he had known it he would for one moment have admitted it. Reading the entire Act, I am satisfied that it never occurred to any person concerned in its preparation or passage that the slob lands were the property of, or were even claimed by, Colonel Vandeleur, or any private person. The persons interested in the Act were, I have no doubt, strangers to the title of Colonel Vandeleur.

(3) As to the deed of 1891, I pass it by with one word of observation. The consideration for it was £5, and a yearly rent of one shilling. The small portions of land conveyed by it were practically worthless to the plaintiff; and I doubt that, until the trial in 1896, it could ever have occurred to him that the use by the Railway Company of those portions of the foreshore could ever be used in derogation of his title to the residue.

(4) As to the judgment of 1896, it is sworn by the plaintiff, and I believe him, that he was taken by surprise at the trial; see his answer, No. 276, that they had no warning that the question of foreshore would be raised, and that they had not the patent or deeds in Court. Even were this otherwise, I should not think the verdict carried much weight, as against the case made by the plaintiff here. I should be inclined to view it as Bayley, J.,

Appeal. 1905. VANDELEUR v. GLYNN. Palles, C.B.

thought the verdict in *Dickens* v. *Shaw* (1) should be treated in a subsequent action brought to try the same right. "The jury would be told by the Judge who tried the cause that very little reliance was to be placed upon it to the prejudice of the Lord; that it was only the inference of the jury from the evidence *then* laid before them; and if, before another jury, *other* evidence be laid, or even the same evidence, and such a statement made which shall induce the jury to come to a different conclusion, there is nothing to prevent them from so doing."

(5) As to the alleged admissions by the plaintiff of the title of the Crown in negotiations relative to the Provisional Order, they cannot be divorced from the circumstance under which they were made. It grew out of a controversy between the plaintiff and the Glynns. In the first instance, there was an admission in that controversy of the plaintiff's title to some tolls, and, consequently, to the foreshore. The dispute was as to the rate of tolls. The amount could not be settled otherwise than by expensive litigation, or by a Provisional Order (confirmed by Parliament) under the Piers and Harbours Acts (Harbour Docks & Piers Clauses Act, 1847), vesting the quay in the plaintiff. On the basis of the admission of his title, without an idea that it would be controverted, he entered upon negotiations for a Provisional Order; but to it the consent of the Board of Trade was necessary. This consent was refused, unless the plaintiff admitted the title of the Crown; but this admission was incident to the plaintiff obtaining a parliamentary title to that which he regarded as his own already. I am satisfied that the plaintiff did not intend to admit the title of the Crown, otherwise than conditionally upon that title being granted to him.

Upon the whole, I regard those five acts relied upon by the Crown as of little substantial weight, as compared with what I consider the very strong case the plaintiff has made of title to the foreshore. As to the question whether if the plaintiff has shown (as in my opinion he has) a title to the foreshore, a grant should not be presumed from the Crown to a former owner of that shore

(1) Hall on Seashore, 2nd ed., App. xiii.

to take reasonable tolls by way of quayage for the use of the pier erected thereon, little more has been said than to refer, as Mr. Redmond Barry has done, to certain passages in the judgment I gave in the King's Bench Division upon the hearing of the case stated by Gibson, J., upon the Appeal from the County Court Judge. But the object of those passages was to show (as stated in the judgment) that the question there raised a question of title which ousted the jurisdiction of the County Court Judge. How could such a grant be presumed unless it were shown (as it has been here), but was not, and could not legitimately have been shown, before the County Court Judge that the title to the foreshore was in the plaintiff? My words are, "But the consideration of these circumstances would involve questions of title, and these *ex hypothese* cannot be entered on in the Civil Bill Court." It is sufficient for me to say that I agree with the Master of the Rolls that such a presumption should be now made.

I, therefore, concur in the judgment of the Master of the Rolls upon the whole case, and I am of opinion that both of these appeals should be dismissed.

We have no jurisdiction to give costs against the Attorney-General. The Order, therefore, will be that the judgment of the Master of the Rolls shall be affirmed, that both appeals shall be dismissed, and that the Messrs. Glynn shall pay any additional costs caused by their appeal.

Solicitor for the plaintiff: *Cullinan.*
Solicitors for the Attorney-General: *Hallowes & Hamilton.*
Solicitor for M. Glynn & Sons: *Fitt.*

G. Y. D.

M. R.
1905.

July 7, 11.

Appeal.

July 26, 27.

THE PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

Trustee—Investments—Urban district stock—Foreign railways—Ordinary stock of railway company—Irish Land Act, 1903, *s.* 51.

The stock issued under the regulations of the Local Government Board (20th February, 1892) by an urban district council is a mortgage secured upon the rates or taxes levied, under the authority of an Act of Parliament, by a local authority within the meaning of sect. 51 (1) (a) of the Irish Land Act, 1903, and purchase-money of settled land purchased by means of an advance under the Land Purchase Acts may, pursuant to that section, be invested therein, subject to the proviso in clause (f).

The £10 shares of a tramway company, the interest on which at £5 per cent. is guaranteed by specified portions of two counties, £2 per cent. being refunded to the counties by the Treasury, are authorised by clause (d) of the same section for the investment of such purchase-money, subject to the proviso in clause (f).

Debenture stock of a company incorporated and registered under the English Companies Acts for the purpose of holding and working a railway in a foreign country, which, for the ten years immediately preceding the date of investment, has paid a dividend on its ordinary shares, is authorised by clause (f) of the same section for the investment of such purchase-money, subject to the proviso in the same clause. But the debenture stock of foreign railways owned by companies not so registered is not authorised as an investment of such purchase-money.

The ordinary fully-paid stock of a railway company in this country, which has paid a dividend thereon for the ten years immediately preceding the date of the investment, is authorised by clause (f) for the investment of such purchase-money, subject to the proviso in that clause (FitzGibbon, L.J., *diss.*).

The proviso in clause (f) requires that the sufficiency of any of the investments enumerated in the earlier part of sect. 51 to realise the sum invested therein upon the death of the tenant for life or the termination of the trust, shall be established to the satisfaction of the Public Trustee.

ORIGINATING SUMMONS.

Application by the Public Trustee that the following questions arising in the administration of the trusts of a compound settlement created by two indentures dated, respectively, 22nd April, 1881, and 4th September, 1891, might be determined under

Order LV., Rule 4, of the Rules of the Supreme Court (Ireland), 1891 :—

(1). Does the proviso in clause (*f*) of the first sub-section of section 51 of the Irish Land Act, 1903, require that security by way of cover, insurance, or otherwise, shall be given in order to insure the sufficiency of the investments therein referred to, to realise the sum invested on the death of the tenant for life to the satisfaction of the Public Trustee; or does the said proviso mean only that such sufficiency shall be established to the satisfaction of the Public Trustee after investigation and consideration of the price of such investments and the security afforded by the same?

(2). Do the following securities, or any, or which of them come within the range of securities in which the trustees of the said settlement can invest capital moneys subject to the trusts thereof on the request of Maxwell Vandeleur Blacker-Douglas, the tenant for life under the said settlement, subject to the proviso in clause (*f*) of the first sub-section of section 51 of the Irish Land Act, 1903? viz. :—(*a*) Kingstown Township $3\frac{3}{4}$ per cent. Stock; (*b*) Clogher Valley Tramway Company Guaranteed Shares; (*c*) Buenos Ayres Great Southern Railway 4 per cent. Debenture Stock; (*d*) Buenos Ayres Great Western Railway 4 per cent. Debenture Stock; (*e*) Buenos Ayres and Rosario Railway 4 per cent. Debenture Stock; (*f*) Canadian Pacific Railway 4 per cent. Debenture Stock; (*g*) Illinois Central Railway 4 per cent. Bonds of 1953; (*h*) Chicago, Milwaukee, and St. Paul R. R. Bonds of 1989; (*i*) Chicago, Milwaukee, and St. Paul R. R. 7 per cent. Preference Shares; (*j*) Great Northern Railway of Ireland Ordinary Stock; (*k*) San Paulo Railway of Brazil 4 per cent. Debenture Stock.

The summons was originally issued by the Public Trustee as plaintiff, naming the trustees of the settlement and the tenant for life as defendants. But doubts having arisen as to whether there was jurisdiction to decide the questions on the application of the Public Trustee, the summons was amended by adding the infant remainderman as a plaintiff suing by the Public Trustee as his next friend.

The tenant for life had sold portion of the lands comprised in the settlement to the tenants under the Irish Land Act, 1903, and

M. R. 1905. PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

requested the Public Trustee to consent to the trustees of the settlement investing out of the purchase-money of the said lands several sums of £5000 each in the securities mentioned in the summons. By the terms of the settlement the trustees were authorised to invest the purchase-money "in or upon any of the public stocks or funds or Government securities of the United Kingdom, or India, or Stock of the Bank of Ireland, or upon freehold or chattel real securities in England, Wales, or Ireland, or upon an assignment by way of mortgage or absolutely, of any charge, lien, or incumbrance affecting lands or hereditaments in Ireland, or in or upon the guaranteed or preference stocks, or shares, debentures, or debenture stock, mortgages, or securities of any corporation or company incorporated by Act of Parliament or Royal Charter in the United Kingdom or India."

None of the proposed investments came within the range authorised by the settlement, but it was contended by the trustees and tenant for life that they came within the range sanctioned by section 51 of the Irish Land Act, and they requested the Public Trustee to certify under the proviso in clause (*f*) of that section as to the sufficiency of the proposed investments to realise the sum invested therein upon the death of the tenant for life or the termination of the trust. The Public Trustee replied that he was advised that it was by no means clear that any of the proposed investments came within section 51, and also stated that, having regard to the use of the word "'" secured" in clause (*f*), he was not prepared to certify his satisfaction under that clause unless there was some actual security in the nature of cover or insurance given that the proposed investments would realise the sum invested on the death of the tenant for life. He intimated, however, that, as the proposed investments seemed good and prudent investments, he was willing to take the opinion of the Court as to whether they came within the range authorised by sect. 51 of the Act, and also as to the meaning of the proviso in clause (*f*). The originating summons was accordingly issued.

An affidavit by Mr. Richard Pim, of the Dublin Stock Exchange, gave the particulars as to the several proposed investments. From this it appeared that, in their prospectus when issuing the stock, the Kingstown Urban District Council

stated that "Trustees under the Irish Land Act, 1903, are authorised to invest trust funds in this stock"; and, in a foot-note explaining the statement, referred to sub-sect. 1, clause (*a*), of the 51st section of the Act. Mr. Pim added that it was not clear whether any of the words used in the Act, "mortgages, debentures, or bonds," could be applied as describing the issue of this stock. The stock was issued in 1904, in pursuance of an order of the Local Government Board; it was originally issued at £97 5*s.* per cent., and its present value was £101 10*s.* per cent.

The Clogher Valley Tramway Company Guaranteed Shares are £10 shares, bearing interest at £5 per cent., guaranteed by certain portions of counties Tyrone and Fermanagh, £2 per cent. being refunded to the counties by His Majesty's Treasury. The present price per share was £13 2*s.* 6*d.* It was submitted by Mr. Pim that these shares came within clause (*d*) of section 51.

The three railways in Buenos Ayres, and the San Paulo Railway in Brazil, in whose debentures it was proposed to invest, are owned by companies registered under the English Companies Acts, and with registered offices and bankers in London. They had all paid dividends on their ordinary stock for the ten years last past. The present price of these debentures ranged from £108 to £109 per cent.

The Canadian Pacific Railway is also owned by an English Company registered under the Companies Acts with its registered office in London. It had paid a dividend on its ordinary shares for the ten years last past, and the present price of the debentures was £110 per cent.

The Illinois Central Railway, and the Chicago, Milwaukee, and St. Paul Railway are owned by companies registered under American law in the United States. They had both paid dividends on their ordinary shares for the ten years last past. The Illinois Central Railway 4 per cent. bonds are redeemable in 1953; their present price was £107 per cent. The Chicago, Milwaukee, and St. Paul 4 per cent. bonds are redeemable in 1989, and their present price was £114 per cent. The present price of the 7 per cent. preferred shares of the same company was £190 per cent.

M. R. 1905.

PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

The Great Northern Railway of Ireland had paid dividends for over ten years at the rate of £6 10*s.* per cent. per annum on its ordinary stock, the present price of which was £159 10*s.* per. cent.

Jellett, K.C., and *Dixon*, for the Public Trustee and infant remainderman.

S. L. Brown, K.C., and *C. W. R. Brady*, for the tenant for life and trustees of the settlement.

The arguments are fully given in the Court of Appeal.

July 11.

THE MASTER OF THE ROLLS:—

This is an application brought before me on behalf of the Public Trustee, under the 24th Rule of the Rules made in 1904, under the Irish Land Act, 1903.

The rule in question says:—"The Public Trustee may, in any case in which it is expedient, take all necessary steps for obtaining the opinion of a Judge of the Chancery Division of the High Court of Justice, under Order LV. of the Rules of the Supreme Court in Ireland, or otherwise as to any question arising in the administration of any trust."

It appears that the trust in this case is connected with the estate of Mr. Blacker-Douglas, which is in settlement, and has been sold under the Act, leaving a very large sum of money, about £60,000, for investment, and the questions which the Public Trustee asks me to decide for him are in reference to the powers contained in the sub-section (1) of section 51 of the Land Act of 1903. And the first question is—Does the proviso in clause (*f*) of that sub-section require that security by way of cover, insurance, or otherwise, shall be given in order to insure the sufficiency of the investments therein referred to; or does the said proviso mean only that the sufficiency of these investments shall be established to the satisfaction of the Public Trustee? That arises in this way. Section 51, which very largely increased the powers of trustees in reference to the investment of the proceeds of sales under the Land Act of 1903, provides a number of investments which may be selected by the parties with the consent of the Public Trustee. It is divided into sub-clauses. Included in

the first are :—"Bonds, debentures, or mortgages, secured upon rates or taxes levied under the authority of any Act of Parliament or Provisional Order by any municipal corporation or other local authority in the United Kingdom which shall be authorised to borrow on such security." The next sub-clause (*b*) includes :—"Ground rents arising out of hereditaments in the United Kingdom and not exceeding in amount one-fourth part of the annual value at a rack rent of the premises out of which such ground rents issue." The next sub-clause (*c*) is :—"Debentures or mortgages of railway companies in the United Kingdom incorporated by the Act of Parliament." The next sub-clause (*d*) is :—"Stocks or shares of any tramway or light railway, dividends upon which are guaranteed under the Tramways (Ireland) Acts, 1860 to 1900." The next sub-clause (*e*) is :—"Bonds, debentures, or mortgages secured upon any investments in which trustees are authorised by this or any other Act to invest trust funds." The next sub-clause (*f*) is :—"Debentures or fully paid shares or stocks of any railway which for the ten years immediately preceding the date of investment has paid a dividend on its ordinary shares." Then comes the proviso upon which the first question in this case turns :—"Provided that the sufficiency of any such investments as are hereinbefore in this section recited to realise the sum invested therein upon the death of the tenant for life or the termination of the trust shall be *secured* to the satisfaction of the Public Trustee under this Act." Then follows another clause, sub-section (*g*) :—"Any investment authorised by the rule-making authority under section 61 of the Supreme Court of Judicature (Ireland) Act, 1877, as amended by any enactment."

The first question, therefore, is as to the meaning of the proviso, "that the sufficiency of any such investments as are hereinbefore in this section recited to realise the sum invested therein upon the death of the tenant for life or the termination of the trust shall be secured to the satisfaction of the Public Trustee under this Act."

Now, having regard to the position in which this curious proviso appears, it would *prima facie* seem intended to apply only to its immediately antecedent sub-section (*f*). But its terms

M. R. 1905.

PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

could not be more wide than they are. It must undoubtedly apply to all that goes before. "Provided that the sufficiency of any such investments as are hereinbefore in this section recited." Not "in this sub-section," but "in this section." The wording of that sub-section has been the subject of considerable criticism, and indeed the phraseology employed throughout the whole of it does appear to be open to remark. But it is not right to find too much fault with that; because I think it is tolerably plain that this whole section must have been the subject of discussion and amendment as it was passing through committee in either one House or the other or both; and it is not easy to reconcile every phrase in it with the rest. It is not the work of the original draftsman. There is some inconsistency undoubtedly. In the first place, it may be a matter of criticism as to what is meant by, "The sufficiency of any such investments as are hereinbefore in this section *recited*." I suppose that must mean "hereinbefore in this section described." But whatever it is, it is perfectly plain that that proviso is not limited to the immediately antecedent sub-section; but whatever is its legitimate meaning, it must extend to the whole of these classes of securities. Then what is really meant by saying that the sufficiency of an investment shall be "secured to the satisfaction of the Public Trustee under the Act"? Now, take it that any one of the investments mentioned before was of such a precarious nature as to require security, that is, one which it would be improper for the Public Trustee or for any trustee even if he had power to invest in. The security then becomes the important thing, because, if there be something outside the investment itself, it is upon the security that the investment must really depend. If it is precarious, then the security is the important matter to inquire into specially; but there is no provision in the Act, which is very precise as to what the investments are to be—at least it is very detailed as to what the investments are to be—there is no provision as to what class of security, if it be something outside, the trustee, whether public or private, is to adopt; and it would, as it struck me at once on reading it, if it were intended that there should be some kind of collateral security, render the clause absolutely unworkable, because the fund may belong to a tenant for life, and that

tenant for life may be an infant and may live to the age of ninety years, and yet the security is to extend to the end of ninety years so that the fund shall be then safe. Thus, if that be the meaning, the security is the important thing. Yet the Public Trustee is left—if that were the case—without chart or compass or without any guide whatever as to what kind of security he should obtain, and in what way he should take it. Then, again, can it possibly, in its application, mean that there is to be collateral security? I will take as a test one of the clauses as to investments —take (*d*):—"Stocks or shares of any tramway or light railway, dividends upon which are guaranteed under the Tramways (Ireland) Acts, 1860 to 1900." Those stocks or shares are guaranteed first of all by a baronial guarantee, which secures them by a charge of ample magnitude upon the baronies through which the railway runs; but if that were not sufficient, it is counter-secured to the extent of two per cent. out of public funds. Therefore, you have got in reference to that, first, the baronial guarantee; and, second, the partial guarantee out of public funds. What is the meaning then? Are those to be secured to the satisfaction of the Public Trustee? I do not know what kind of securities could possibly be suggested that would not appear absurd in comparison with an investment of that class or character. That is only an example. I think, therefore, if any construction can be put upon that proviso which does not involve the giving of a collateral security, that construction ought necessarily to be adopted *ut res magis valeat quam pereat*, in order that there may be some working efficacy in this section. Let us read the proviso again:—"Provided that the sufficiency of any such investments as are hereinbefore in this section recited to realise the sum invested therein upon the death of the tenant for life or the termination of the trust shall be secured to the satisfaction of the Public Trustee under this Act."

Now, the word "secured" is undoubtedly, in this context, an ambiguous and difficult word to deal with. It would, *prima facie*, appear to refer to something outside the investment itself; but it is not always used in a very logical way throughout this section, and it would appear that the meaning probably was not strictly that it should be secured to the satisfaction of the Public Trustee, but that

M. R. 1905.

PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

the investment should be secure to his satisfaction. If, instead of "secured," the word were "established," or even "secure," there could be no question about it that the sufficiency of any such investments shall be established to the satisfaction of the Public Trustee, and I think, having regard to the loose way in which the word "secured" is used in the clause, that that is the meaning of it; that the sufficiency of the investments, whether baronial guarantees or anything else, to realise the sum invested, must be established to the satisfaction of the Public Trustee. Having regard to the nature of the investments, that would appear to be a very necessary and very proper proviso, because, as we shall see afterwards, whilst some of the investments are of such a character that they might be perfectly safe, yet others might not be safe at all, and, therefore, in adopting in any particular case any particular investments, there is ample room and need for the exercise of discretion by the Public Trustee, and for the establishment to his satisfaction of the sufficiency of the security. Therefore, in my opinion, the answer to the first question, as to the meaning of the proviso, is that the proviso means only that the sufficiency of the investments shall be established to the satisfaction of the Public Trustee, after investigating and considering the terms of such investments, and the security afforded by the same.

This, then, opens up the question which is the practical one, namely, what investments are within the scope of the section? And these have been very conveniently classified in the affidavit of Mr. Pim, a well-known stockbroker; and he has set out those in which, I do not think it is actually proposed, but at any rate it is suggested, that the investments of the fund shall take place. I may say that, looking through them, they all appeared, so far as I could form an opinion, to be very good investments—it is a question, of course, whether they are proper trustee investments within the meaning of this Act, and they struck me as having been selected and suggested by Mr. Blacker-Douglas, not with the view of suiting his own immediate benefit as tenant for life, but with a view to that which would be safe and proper for everybody interested under the settlement. There is great difficulty about some of them, however, and the first one is not one as to

which I am able to say that I think it comes within the meaning of the words of this Act, and that is, Kingstown Township $3\frac{3}{4}$ per cent. stock. That is stated by Mr. Pim to be a redeemable stock issued by the Kingstown Urban District in 1904, in pursuance of a consent order of the Local Government Board, and under the authority of various Acts of Parliament. It was issued originally at £97, and he mentions the figures. He mentions also—which was the case—that the Kingstown Urban Council in their prospectus stated that "Trustees under the Irish Land Act of 1903 are authorised to invest trust funds in this stock"; but that is the question which has now to be considered, whether it comes within the terms of the section under clause (*a*). Clause (*a*) deals with:—"Bonds, debentures, or mortgages secured upon rates or taxes levied under the authority of any Act of Parliament or Provisional Order by any municipal corporation or other local authority in the United Kingdom which shall be authorized to borrow on such security."

This is not a bond. It is not a debenture, so far as I know, whatever meaning is attached to the word "debenture." It is not a mortgage. It appears to be really a portion of the stock representing a loan which is not secured by any specific charge on the rates, but payment of which may be enforceable by application to the Court to appoint a receiver in any particular case if the interest falls into arrear. It is very probable that the framers of the section, or those who amended it, did not consider very carefully, and may have intended to include stocks, such as this Kingstown Stock, but it does not fall within the words I have used, "bonds, debentures, or mortgages," and even though under Order LV. the direction of the Court to the Public Trustee would, I think, in any particular case keep him safe if he authorised it, it does not seem to me that I can say this is within the words of the clause, and, therefore, if it is not within the words I cannot legislate to make it within the words; and although it may have been intended, I think that the object has been missed somehow. I am not satisfied that the security might not be postponed to a mortgage upon the rates though subsequent in date.

The next is the Clogher Valley Tramway Company Guaranteed Shares, and this comes, in my opinion, within

M. R. 1905. PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

clause (*d*) :—"Stocks or shares of any tramway or light railway dividends upon which are guaranteed under the Tramways (Ireland) Acts, 1860 to 1900."

I do not entertain any doubt whatever about that, and accordingly my decision will be to that effect.

Then there are a number of stocks which raise a much wider question. Take the first of them: Buenos Ayres Great Southern Railway 4 per cent. debenture stock. It is stated that this is a debenture stock, that the railway has for the last ten years paid dividends on its ordinary stock. Mr. Pim observes it is a foreign railway, although its directors are, for the most part, English, and its registered offices and bankers are in London. The nationality of its directors and bankers is, of course, immaterial. It has a registered office in London, and it was stated here at the Bar, and some document was referred to for it, that this company is registered as an English company, and comes under the Companies Acts, and therefore its *status* here is that of a limited liability company working a railway in Buenos Ayres. Now, is that within any of the clauses of this extended investment power? It is said that it is within clause (*f*) :—"Debentures or fully paid shares or stocks of any railway which for the ten years immediately preceding the date of investment has paid a dividend on its ordinary shares."

That it is a railway, although a foreign railway, cannot be questioned; but it is a railway which does not physically, so far as the land through which it runs is concerned, come within the jurisdiction of the Court. It is subject to foreign law, and is in a foreign country, and, so far as being a limited liability company is concerned, I should say it is only *pro forma* within the jurisdiction of this Court, but really it is not; and it is therefore a question of admitting the "debentures or fully paid shares or stocks" of a railway company not within the United Kingdom. There can be no question but that, apart from this section, any such debenture stock as is here proposed would be entirely outside the powers of any trustee investing, however good the investment might practically be, as trustees are bound to have the trust property within the control of the Courts, and not to be driven

in case of difficulty or distress to go abroad to South America or elsewhere for the purpose of realising the security or dealing with it. But, literally, it is a railway, and the debentures literally come within the language of that clause; but, in my opinion, the word "railway" must receive its meaning by reference to the whole, not only of the clauses of this particular investment power, but—on the principle *noscitur a sociis*—of all the other powers of investment possessed by trustees, either under the Settled Land Act rules or under the Judicature Act rules. I have searched them all. There are cases in which the debentures of foreign railways may be used by trustees, but where they are it will be found that they are guaranteed railways expressly named, such as Indian Railways, and the guaranteeing government is expressly referred to; and, with that exception, in no single case has it ever been dreamt that trustees could invest in foreign railway stocks, or foreign railway debentures. The word is "railway" in this particular clause, and in some of the others it is "railways in the United Kingdom," and I think on the whole, though there is a certain looseness about the way in which that clause, like some of the others, is expressed, the meaning is, railways of the class that we know, railways that are known to our Acts of Parliament and are regulated by them, and are within the jurisdiction of our Courts; and I think if it had ever been intended to give power to trustees to invest in foreign railways that would be such a startling change that it must have been the subject of special legislation. If there were any doubt about the construction, I should be bound to err—if I err at all—on the side of caution, because other people may be investing on a very large scale, and, therefore, I am unable to give to those words, wide as they look, any other meaning than that the railway which is referred to there is a railway under our law, and of the same class which is referred to throughout in all other clauses and in all the other provisions of this very section; because I find in clause (*c*):—"Debentures or mortgages of railway companies in the United Kingdom, incorporated by Act of Parliament," and so forth. It is said then that clause (*c*), when taken in connexion with clause (*f*), must mean something different, because clause (*f*) would otherwise overlap. There is no doubt it would.

M. R. 1905. PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

It is open to that observation, because, if you limit clause (*f*), as I am going to do, there is no doubt that "debentures" of railways in the United Kingdom is covered by both. While, then, one clause says, "debentures or mortgages," the other says, "debentures or fully paid shares or stocks," but I think in both cases it is debentures or fully paid shares or stocks of a railway within the United Kingdom. That, therefore, in my opinion, excludes the next and most of the other investments that are the subject of consideration here, even the Canadian Pacific 4 per cent. debenture stock, which everybody recognises as a good security, but it does not come within the class of railways that may be selected. It has not even its offices in London, and is therefore out of the jurisdiction quite as much as if it were in the United States. It is the same with the Illinois Central Railway 4 per cent. bonds of 1953, the Chicago, Milwaukee, and St. Paul Railroad, 4 per cent. bonds of 1989, and the Chicago, Milwaukee, and St. Paul Railroad 7 per cent. preferred shares.

Then comes a suggested investment which raises a curious question on the sub-section—Great Northern Railway of Ireland ordinary stock. Dividends have been paid on this ordinary stock for the last ten years, and its present price is about 159. That would be a matter, of course, for the Public Trustee to consider (if it be within these powers of investment) as to its likelihood at the end of the period, on the death of the tenant for life, to realise the amount paid for it—that is, £159 for each £100 of stock. But does it come within the clause (*f*)? I have dealt with the word "debentures," and the alternative is that with which I have now to deal—"debentures *or* fully paid shares of any railway." Taking it that "railway" must mean a railway of the United Kingdom from what I have said, what remains to be decided is, what is meant by "fully paid shares or stocks of any railway which, for the ten years immediately preceding the date of investment, has paid a dividend on its ordinary shares"? The suggestion in reference to that was that "fully paid shares or stocks" must mean debentures or preferred stocks of some particular kind; but I can only deal with it as I find it, and I am unable to give any meaning to that clause at all, unless it be that, if the Public Trustee is

satisfied, he may have power to invest in any "fully paid shares or stocks" in railways which satisfy the prescribed condition. It admits of no ambiguity. What is the meaning of "fully paid"? I do not see that it is capable of any meaning whatever except that the whole of the liability has been paid up and there is no remaining possibility of call upon the security. If so, it must apply to ordinary stocks as well as to preference stocks, and "shares" are expressly included. If it had been intended to confine it to preference stocks, it should have been stated plainly. Debentures and mortgages have been mentioned before, and therefore I think that this class of security, namely, the ordinary stock of any railway company that has for ten years paid a dividend on its ordinary shares, is open, and it is for the Public Trustee to exercise his discretion on the meaning that I have attributed to the proviso, if he is satisfied (and he will be a sanguine man if he *is* satisfied) that the investment will, at the termination of the trust, or death of the tenant for life, be sufficient to replace the funds in the settlement. Subject to that, I think that the Great Northern Railway of Ireland ordinary stock is within the powers of investment, although I do not say, as a matter of law, that it ought or ought not to be adopted in that particular case. I may say that if I were in the position of the Public Trustee, it would be very difficult to persuade me that any ordinary stock of a railway company was secure in the sense I have indicated. We all know to what relatively immense fluctuations in value such stocks are liable. But this does not affect the legal questions.

The remaining investment suggested is in the San Paulo Railway (of Brazil) 4 per cent. debenture stock. This is a foreign railway company, although it has offices in London; and from what I have said before in reference to foreign railways, this cannot be utilised. Therefore, I have answered the questions as regards all these several classes of investments.

As regards the question of costs, in my opinion this is a case in which the Treasury ought to pay the costs of both sides. It is clearly a public question, and the Public Trustee has brought the matter forward in the most economical way. If any of the parties desire to take the opinion of the Court of Appeal on any of these matters of principle, though I have, of course, no power to do more

M. R. 1905. PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

than express my own opinion, it would appear to me that the Treasury might very properly consent to incur the cost of obtaining a finally authoritative determination of a very difficult public question.

R. W. L.

Appeal. July 26, 27.

The defendants appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon and Holmes, L.JJ.) from so much of the order of the Master of the Rolls as related to the Kingstown Urban District Stock, and the foreign railway securities. The plaintiff also appealed, asking the opinion of the Court as to the proviso in clause (*f*), and as to the proposed investment in Great Northern (Ireland) Railway ordinary stock.

S. L. Brown, K.C., and *Herbert Wilson, K.C.* (with them *C. W. R. Brady*), for the defendants:—

Section 51 of the Irish Land Act is in terms an enlargement of the existing range of trustee investments, and should be construed liberally. The nature of the Kingstown Urban Stock was not fully described to the Master of the Rolls. It was issued under the "Regulations as to Issue of Stock" made by the Local Government Board, 20th February, 1892 (Vanston, vol. ii., p. 1312). Article 2 of these regulations provided for the creation of the stock. Article 4 provides that "all stock for the time being issued, and the dividends thereon, shall be, and the same are by virtue of these regulations, charged indifferently on all the revenues of the urban authority. The dividends for the time being payable on all stock shall rank equally with interest on all other securities of the urban authority created or granted in pursuance of any statutory borrowing power at any time after the date of the first creation of any stock, and the same dividends and interest shall, subject to all charges existing at that date, be the first charge on all the revenues of the urban authority." The stock is redeemable, a fund being provided for the purpose (Articles 13–16). Another fund is provided for payment of dividends (Articles 6–12). If the dividends are not paid, the person entitled can have a receiver

appointed who shall have power to assess, make, and recover all rates for the purpose of getting in all moneys which ought to be applied to the redemption fund or the dividends fund (Article 43). The certificate issued to the holder of stock in the prescribed form is evidence that he owns so much money secured by a statutory mortgage on the rates.

As to the foreign railways, clause (*f*) expressly authorises for investment of this purchase-money "debentures of any railway *which for the ten years immediately preceding has paid a dividend on its ordinary shares.*" Clause (*c*) had previously authorised "debentures of railway *companies in the United Kingdom.*" It is plain, therefore, that Parliament intended to allow investment in foreign railway debentures when the railway had paid a dividend for the prescribed time.

As to the Great Northern Railway ordinary stock, it plainly comes within the express words of clause (*f*). It is fully paid stock; and the company has paid a dividend on its ordinary shares for the prescribed time.

Jellett, K.C., and *Dixon*, for the Public Trustee:—

Independently of express provision in statutes, or in the instrument creating the trust, a trustee can invest in nothing except the Government Funds: *Howe* v. *Earl of Dartmouth* (1). Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 22, was the earliest enactment authorising trustees to invest outside the Government Funds, and it only extends the range to stocks of the Bank of England, and the Bank of Ireland, and East India Stock. This Act was so strictly construed that the words "East India Stock" occurring therein were held not to include East India Stock created after the passing of the Act (13th August, 1859): *Re Colne Valley and Halstead Railway* (2); *Re Fromow* (3); and another Act, 30 & 31 Vict. c. 132, s. 1, was passed to authorise investments in East India Stock, charged on the revenues of India created under any subsequent Act of Parliament. The next statutory extension of the range of trustee investments was introduced by 23 & 24 Vict. c. 38, which empowered trustees who had "power to invest their

(1) 7 Ves. 137. (2) 1 De G. F. & J. 53. (3) 8 W. R. 272.

Appeal. 1905. PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

trust funds upon Government securities, or upon Parliamentary stocks, funds, or securities, to invest such trust funds in any stocks, funds, or securities, in or upon which," a General Order to be made under the 10th section of the same Act might authorise cash under the control of the Court to be invested. The General Order referred to was made on the 24th day of May, 1861, and authorised investment in Bank of Ireland Stock, upon mortgage of freehold or copyhold estates in Ireland, as well as Government New £3 per cent. Stock, and Consolidated £3 per cent. Stock (I. R. 8 Eq. 306). After the passing of this statute it was held that a sum of money deposited pursuant to the Parliamentary Deposits Act is "not cash under the control of the Court, within the meaning of the corresponding English General Order (1st February, 1861), and could not be invested in the securities first authorised by that order: *Ex parte Great Northern Railway Company* (1). These cases show how strictly the Court construes Acts enlarging the scope of trustee investments, always looking for clear and express words to admit each new security within the range. The other Acts extending the range of trust securities are the Settled Land Act, 1882, sect. 21, the two codifying enactments, the Trust Investment Act of 1889, and the Trustee Act, 1893, sect. 5, and, lastly, the Colonial Stock Act, 1900. These Acts all specifically enumerate the investments which they authorise after the manner used by conveyancers in the investment clauses in settlements and wills. Such clauses are always most strictly construed. Thus it was conceived that a power to lend on "debentures" would not authorise an investment on "debenture stock" (Lewin on Trusts, 11th ed., page 347), and hence was passed the Debenture Stock Act of 1871 (34 & 35 Vict. c. 27), now incorporated in the Trustee Act, 1893. By parity of reasoning it would be hard to say that a power to lend on "mortgages secured on rates and taxes," included power to lend on "stocks" like the Kingstown stock, secured on rates and taxes. Again, it has been held that a power to invest in "any of the public funds, or in Government or real securities, or upon the stocks, shares, or securities, of any railway

(1) L. R. 9 Eq. 274.

or other public companies," is confined to public companies in the United Kingdom: *Re Castlehow* (1). So, too, where a will authorised investments in "shares of any established railway in full operation," it was held that investments in shares in railways within the United Kingdom only were authorised: *Edwards* v. *Thompson* (2). These cases demonstrate that, apart from express words authorising foreign investments, such securities cannot be taken to come within sect. 51 of the Irish Land Act. "Railway," in clause (*f*), must mean "railway company" as known to English law. The Trustee Act, 1893, sect. 5, contains no words limiting the locality of the securities thereby authorised; but it never has been suggested that it authorised foreign investments. It makes no matter that the company working a foreign undertaking is registered in England. The ultimate security must be the property in the foreign land, and the foreign law affects the remedy *in rem*.

The Public Trustee is, under this section, to exercise a *quasi* judicial function. Apart from express words showing an intention to extend the range of investments to foreign securities, he cannot, having regard to decided cases, allow investments in foreign securities. Where an estate was being judicially administered, the trustees, by the will, being authorised to invest "at their discretion," Sir G. Jessel, M.R., held that it was not proper to invest the money in American railway stocks and securities, and refused to allow such investments, though desired by the trustees: *Bethell* v. *Abraham* (3). To the same effect is *Brown* v. *Brown* (4). There cannot be produced a single case in which a Court has authorised the investment of money under its control in a foreign country.

The Great Northern Railway ordinary stock does not come within the words "fully paid up shares" in clause (*f*). That clause is framed on the analogy of sect. 21 (i) of the Settled Land Act, 1882, and sect. 21, (*g*), (*l*), of the Trustee Act, 1893. Its intention was to enable the investment to be made in some higher grade of shares or stock where a dividend had been paid on the ordinary shares. "Fully paid shares" are thus used in contradistinction to "ordinary shares."

(1) [1903] 1 Ch. 352.
(2) 38 L. J. Ch. 65.
(3) L. R. 17 Eq 24.
(4) 29 Ch. D. 889.

Appeal. 1905.

PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

July 27.

LORD ASHBOURNE, C. :—

This is an appeal from a decision of the Master of the Rolls, and, to use his own words, it is upon "a very difficult public question." Under Rule 24 of the rules made by the Land Judge and the Land Commission, under the powers conferred on them by the Irish Land Act, 1903 (section 52 (15)), the Public Trustee has most reasonably asked for the opinion of the Court on the important questions that are involved. That rule is in the following terms :—"The Public Trustee may, in any case in which it is expedient, take all necessary steps to obtain the opinion of a Judge of the Chancery Division of the High Court of Justice under Order LV. of the Rules of the Supreme Court of Ireland, or otherwise as to any question arising in the administration of any trust." In order to avoid the possibility of any technical questions being raised as to the sufficiency and propriety of his *status* before us in addition to his position as Public Trustee, he comes before us as next friend of an infant remainderman.

The questions so brought forward by the Public Trustee arose in the following manner :—On the sale of portion of the Blacker-Douglas estate the sum of about £60,000 was realised, and the tenant for life, Mr. Blacker-Douglas, being anxious to obtain a reasonable return—not pressing the powers of investment to any very extreme point—but wishing to obtain a reasonable return for the purchase-money, submitted to the Public Trustee certain investments which he thought were worthy of consideration, and that might be not unfairly adopted and sanctioned by the Public Trustee. The Public Trustee considered with attention the various securities that were submitted for his judgment, and he reached the conclusion that all the various securities suggested were sound and valuable. But being informed that there were points of law that required consideration, he thought it right and a reasonable exercise of the powers vested in him to avail himself of the permission given to him under the 24th rule to ask for the opinion of the Court, the Master of the Rolls in this case, as to the points as to which questions had been suggested. They all turn upon sect. 51 of the Irish Land Act of 1903, the marginal note of which uses these words :—"Enlargement of powers of trustees as to investment of purchase-money"; and the introductory words to the clause,

before one comes to the sub-sections, are worthy of attention: "Where any land purchased by means of an advance under the Land Purchase Acts is settled land within the meaning of the Settled Land Acts, 1882 to 1900, the trustees of the settlement may, notwithstanding anything contained in the settlement, on the request of the tenant for life, and without the consent of any other person, invest the purchase-money, or any part thereof, not only in any investment in which trustees are by any Act authorised to invest trust funds, but also in" the several modes of investment mentioned in the various sub-heads that follow, thus indicating, in its phraseology, the intention that a widening should be given to the existing powers of investment, and that that was the point of view in which the Legislature approached the question.

The first point that came before the Master of the Rolls that he applied himself to decide was—what was the operation of the proviso at the end of clause (*f*)? It has not been suggested to us in argument that this proviso does not apply to all the other clauses of sub-section 1, and I take it that it does. The proviso is in the following terms:—"Provided that the sufficiency of any such investments as are hereinbefore in this section recited to realise the sum invested therein upon the death of the tenant for life or the termination of the trust, shall be secured to the satisfaction of the Public Trustee under this Act."

It was urged that "secured to the satisfaction of the Public Trustee" would justify and empower the Public Trustee to ask, in addition to the securities that were purchased, that they should be secured by some collateral insurance or advance. The Master of the Rolls disposed of that by an elaborate process of reasoning, in which I concur, and stated he was of opinion that the word "secured" really meant "established"; that in making the investment the Public Trustee, in the exercise of his great discretion, should have present to his mind that the Act required that he should be of opinion that the security that he was sanctioning was such that it would accomplish the end that was contemplated.

Concurring as I do in the conclusion of the Master of the Rolls on this subject, I do not deem it necessary to say anything more about it.

That leaves to be dealt with next the very important question:

Appeal. 1905.

PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

Lord Ashbourne, C.

What are the investments that are within the scope of the various sub-sections that are here? It is a question of great practical importance, and one as to which the Public Trustee, no matter how well informed in matters of value, has a right to be satisfied that he is proceeding within the law and within what judicial interpretation will hold to be a fair construction of the section. The security that was, in the first instance, presented for the consideration of the Master of the Rolls to ascertain whether, in his opinion, it came within the scope of any of these clauses was the Kingstown Urban District $3\frac{3}{4}$ per cent. redeemable stock. And the question submitted to the Master of the Rolls was this: Whether that stock came within clause (*a*) of the first sub-section of the fifty-first section? That clause is in the following terms:—"Bonds, debentures, or mortgages secured upon rates or taxes levied under the authority of any Act of Parliament or Provisional Order by any municipal corporation or other local authority in the United Kingdom which shall be authorized to borrow on such security." There is no doubt that the authority here—the Kingstown Urban District authority—would be within the section: the question is, does its stock come within any of the terms that are mentioned in the first part of the clause? The investment not being "bonds" or "debentures," but being stock redeemable under the statutory provisions in the way that has been described, can it be held to come within the description of the word "mortgages"?

The Master of the Rolls, in dealing with this question, expressed himself as to what he thought was the meaning and wish of the Legislature. "It is very probable that the framers of the section, or those who amended it, did not consider very carefully, and may have intended to include stocks, such as this Kingstown Stock, but it does not fall within the words I have used, 'bonds, debentures, or mortgages,' and even though, under Order LV., the direction of the Court to the Public Trustee would, I think, in any particular case keep him safe if he authorised it, it does not seem to me that I can say this is within the words of the clause; and, therefore, if it is not within the words, I cannot legislate to make it within the words; and though it may have been intended, I think the object has been missed somehow." I

think it would be unfortunate if one was compelled to adopt that view, and I myself am able to reach a different conclusion. I am of opinion that the Kingstown Urban District 3¾ per cent. redeemable stock does come within the words which I have read. It is a redeemable stock. It is the only stock in existence affecting the rates of Kingstown. There is nothing before it. We were told at the Bar without it being questioned that there are no bonds or debentures issued by the Urban District Council. That is the sole and the only security at present in which the Kingstown debt is placed, and being redeemable and secured upon rates or taxes, in my opinion, it does come within the statutory description, and may be regarded as a security that is entitled to the sanction of the Public Trustee, should he, in his wisdom, think it right to concur in the investment of the purchase-money therein.

Other questions have been raised on the other clauses and on the railways that are named. The list submitted to the Public Trustee, and by him to the Court, includes some of the very best known Canadian securities, some of the very best known of the South American securities, and some, I believe, of the best United States securities; and the Master of the Rolls held in reference to them that they were outside the section, and could not be sanctioned by the Public Trustee, because they were outside the limits of the United Kingdom.

The Master of the Rolls, in the course of his very considered and clear judgment, said that, except in the case of Indian railways, it was never dreamt of that trustees could invest in foreign stocks or debentures, and that if it was intended to give such powers, and to work such a startling change, there should be special and express legislation on the subject. But is that the question? We are construing a clause of a new Act of Parliament that was intended to enlarge the powers of trustees, and intended to widen their powers of investment; and we have ourselves, by the light of our own training and knowledge, and our own appreciation of what the law is, and what the law has been, to consider what is the construction of the present section, and what we are of opinion should be stated to be its legal effect. Now, to arrive at an appreciation of the meaning

Appeal. 1905. PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS. Lord Ashbourne, C.

of this section, one has to take it all. I have read the earlier part. The marginal note is not a part of the section to which one can look for guidance as to its construction; but it shows the description that was applied to it. But I have read the words in the introductory part of the section which state that the section was intended to enable the purchase-money to be invested, not only in any investment in which trustees are by any Act authorised to invest trust funds, but also in other investments, and it, therefore, goes to show that the clauses (*a*) to (*f*) were intended expressly to widen and enlarge existing powers. We find in clause (*c*) power is given to invest in debentures or mortgages of railway companies in the United Kingdom incorporated by Act of Parliament. That is an instance in which the Legislature has pointed out where it so desired that the United Kingdom was to be the geographical boundary in reference to the class of investments that is there described. Then come to (*f*), which is the clause as to which the question arises, and is a new clause following (*c*), which has already provided for the United Kingdom, and what does it say? "Debentures, or fully paid shares or stocks of any railway which, for the ten years immediately preceding the date of investment, has paid a dividend on its ordinary shares." There is no geographical limit there. The previous clauses had all put in either "United Kingdom" or "Ireland." This one omits all reference to any geographical limit, and, taking it in its terms, in its words, there is nothing to compel or suggest to any Court that they should be guided solely by a question of geography. I read, however, the word "railway" as "railway company." I think the word "company" must be introduced, and if you have the word "company" introduced, I think you must also go on by parity of reasoning to look for and supply the words "companies recognized and sanctioned by our laws." Several of these companies, not all of them, but I believe some of the great companies that are named in the list, are registered as English companies. They are under our Companies Acts. They are registered under these Acts of Parliament, and I do not think that such companies can be excluded from the examination of the Public Trustee when he comes to consider whether, in the exercise of his discretion, he will sanction investments in them.

If they were excluded, I do not see what widening of power, what enlargement of powers, would be given by this clause (*f*). Other clauses, as I have said, where the Legislature meant it, have put in the geographical limit of the United Kingdom or Ireland. The omission of these words in this particular clause appears to me to indicate the purpose of giving greater latitude of investment, whenever, as I said before, the Public Trustee, in the exercise of his trained discretion, thinks it wise, and right, and reasonable, and within the proviso to make such investment.

I, therefore, arrive at the conclusion that clause (*f*) is not bound by any geographical limits; but it is bound by the necessity of considering that the companies are joint-stock companies, constituted under the authority of one of our own Acts of Parliament. Otherwise there would be no control or controlling power, and that is a limitation which permits a wide extension and substantial enlargement, which does not compel the investments to be made in the United Kingdom, but does say that the investments, when made, shall be in touch with, and the company in which they are made shall be under the control of, our laws.

Another question—and an important one—is as to the words that are found in clause (*f*), "or fully paid shares or stocks" —in reference to one of the securities that were submitted for the judgment of the Public Trustee, the ordinary stock of the Great Northern Railway of Ireland, a very well-known and successful company. I do not understand that in the way the case comes before us the Public Trustee indicates that he has selected any of these stocks. I understand that the way it came before the Master of the Rolls was that the Public Trustee was asked to consider certain stocks, that he gave an opinion generally as to what he thought of their value, and that he asked for the opinion of the Court in reference to the legality of his action, should he think proper, on a full review of the case, to give his sanction to any of them. The question as to this ordinary stock is this—Is it competent, is it legal—not whether it is right or prudent—but is it competent or legal, should the Public Trustee, in the exercise of his discretion, think it wise, to allow an investment in ordinary shares, or is he excluded under any circumstances from ever considering them?

Appeal. 1905.

PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

Lord Ashbourne, C.

The Master of the Rolls, in reference to this subject, used extremely weighty words in his judgment, which I desire to repeat: "I may say that if I was in the position of the Public Trustee it would be very difficult to persuade me that any ordinary stock of a railway company was secure in the sense that I have indicated. We all know to what relatively immense fluctuations in value such stocks are liable."

It is the common knowledge of everybody that in the case of the greatest companies in the United Kingdom which have got a capital of millions, and are managed with the highest ability by some of our greatest railway-managers, the vicissitudes and fluctuations in the value of their ordinary shares are something very great; and, therefore, I quite see the wisdom and the prudence of the weighty and cautious words that the Master of the Rolls used in reference to such investments; but he arrived at the conclusion that, in the words of clause (*f*), ordinary shares were not excluded from the examination and consideration of the Public Trustee when he came to consider, in the exercise of his discretion, whether he would sanction any investment in them.

I concur in that conclusion of the Master of the Rolls. I am unable to say that I would be justified by the words to be found in the clause in arriving at a different conclusion, although, as I have said, I concur in the strongest possible way with the weighty caution given by the Master of the Rolls in the words that I have read.

These are the three substantial issues which were submitted to us in this appeal, and which have been presented to us most reasonably and most ably in the arguments we have heard.

I have used, several times in the course of my judgment, words which indicated that at every step to be taken the Trustee must apply his own discretion, and, of course, nothing in any judgment can relieve the Public Trustee from the exercise of the vast and responsible discretion reposed in him by this Act. He is entrusted with the performance of great duties, and he must bring to their discharge not only the highest probity, but trained and experienced discretion. In my opinion his appeal for the assistance of the judgment of the Master of the Rolls was absolutely proper and *bona fide*.

I am of opinion that the appeal to this Court, which, indeed, was almost suggested by the Master of the Rolls, was reasonable; and I think that he should be entitled to be recouped for the expenses of these inquiries and arguments as part of the expenses of his office.

FITZ GIBBON, L.J.:—

I take the questions for our decision in the order in which they arise on section 51 of the Land Act, merely premising that the Public Trustee, when acting under that section, appears to me to stand in the same position as a trustee of private property acting under a power of investment. It limits the authority which is given to him of sanctioning investments, which, after due inquiry and by the exercise of his skill and judgment, he has ascertained to possess the intrinsic value essential to the due security which it is his duty to obtain.

The first question arises on sub-section (*a*), viz.: Whether "The Kingstown Urban District Redeemable Stock, 1904," is a "mortgage," within the sub-section. It is secured—that is to say the repayment of the money is secured—by rates levied under the authority of an Act of Parliament, and the Kingstown Council is a local authority authorised to levy rates, and to borrow money on the security of the stock. Therefore, the question—because we can deal only with things coming within the words of the statute—is whether this stock is a "mortgage"? It is right to say that it appears, both from what counsel has told us, and from the judgment of the Master of the Rolls, that he was not as fully informed of the circumstances of this stock as we have been, and I base my conclusion that it is a "mortgage" within the meaning of the Act of 1903, upon considerations which were not fully submitted to him. The word "mortgage" has been defined in several statutes, and the definitions vary with the purposes of the Acts in which they occur. I first take its ordinary meaning from Stroud's Legal Dictionary: "The ordinary meaning of a mortgage is a conveyance of property, with a proviso for redemption, to secure an advance." This stock does not come within that description, because there is no conveyance of property. But Stroud goes on—"and does not include a statutory charge on Turnpike

Appeal. 1905.

PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

Fitz Gibbon, L.J.

Tolls." So the decision of the Master of the Rolls is not only in accordance with the affirmative definition of the word mortgage, but it is also in accordance with the exclusion of a charge on tolls established by judicial authority.

How, then, do I reach the conclusion, notwithstanding, that "mortgage" has a wider meaning here? I look to other statutes, and it is curious how they vary. When the Government wanted to tax it, in the Stamp Act, 1870, a mortgage was defined as "a security by way of mortgage for payment of any definite and certain sum of money, advanced or lent at the time, or previously due or owing." Dealing with real property in his Act of 1859, Lord St. Leonards used words of inclusion which seem to me to support the wider construction which this Court is now adopting, though we are dealing with purchase-money and not with land. Lord St. Leonards' Act says—

> "Mortgage shall be taken to include every instrument by virtue whereof land is conveyed, pledged, or *charged, as security for the repayment of money* or money's worth lent, and to be reconveyed or released on satisfaction of the debt."

Therefore, Parliament, when dealing with land just as the Act of 1903 deals with purchase-money, declared the vital elements of a mortgage to be that it is a charge which is a security for money, to be released on satisfaction of a debt. Every word of that definition, except that the subject-matter is land, is strictly applicable to the stock which we hold to be within the scope of the Act of 1903. The Conveyancing Act, 1881, *in pari materia*, is wider still. "Mortgage includes any charge on any property for securing the repayment of money or money's worth." This Kingstown stock is a security for the repayment of money. It is a charge on all the revenues of the Council. Besides, its very name brings in one of the most typical characteristics of a mortgage—namely, *redemption*. It is "redeemable," *i.e.* the charge is to be released upon repayment of the loan. The Acts and Order under which this stock has been created clearly supply all the essential elements of security. There is no possibility, though the Master of the Rolls was left under a misapprehension about it, that without some new

statutable authority, which, of course, might override everything, any mortgage, bond, or debenture can be put in front of the money secured by the exercise of the borrowing powers of the Kingstown Council. No matter what amount is borrowed, it must all rank *pari passu*, and it must not exceed a limit to be defined by the statutory authority of the Local Government Board. Accordingly it is a security limited in amount, with statutory priority, and charged upon all the revenues—that is, upon all the property of the Council, except, perhaps, the office furniture—and the means of enforcing payment are open to anyone whose interest is not paid. He is not tied down, as in the case of railways, by the necessity of getting anyone else to join, for any and every stockholder has recourse to the Court for the purpose of obtaining a receiver. The nature of that remedy is a further indication that the security is a mortgage, for the chargeants have the means of going into possession through the Court, and of taking *in specie* the revenues pledged for the payment of the debt. On these grounds I am glad to concur with my colleagues on this portion of the matter, particularly as this is the only security before us, so far as I can see—with the single exception of the light railways, the whole capital of which would go but a short way towards investing the purchase-money of the Irish estates—which offers the means of keeping the money at home.

I now come to the second question, the meaning of the words "any railway." With great respect I point out that the words "any railway" are not the only words, nor even the most important words, to be defined, because they are only adjectival to the words "shares or stocks." The section deals with "the *fully paid shares or stocks* of any railway." Mr. Brown admitted that we must read "railway" as meaning "railway *company*." It follows that we must read it as "*joint stock* company," because that is the only sort of company which can have shares or stocks, and property divisible into shares is known to us only under our own joint stock law. Accordingly, it seems to me to follow that before the Public Trustee can accept anything under this clause, he must ascertain that it is the security of a joint stock company constituted under the authority of the Imperial Parliament. The words used are not merely peculiar to our law, they do not occur

Appeal. 1905. PUBLIC TRUSTEE v. BLACKER-DOUGLAS. Fitz Gibbon, L.J.

in any foreign language. I believe that "société anonyme" is the description of the nearest approach to a limited liability company in French. What a joint stock company is in German, I do not know, but I am unable to find any subject-matter for this clause, except the shares or stocks of a joint stock railway company constituted by or under the authority of an Imperial Act of Parliament. In *Re Castlehow* (1) Byrne, J., construed similar words in the investment clause in a will as limited to public companies in the United Kingdom; and Gifford, V.-C., limited a similar power to railways in the United Kingdom in *Evans* v. *Thompson* (2). That comes very near my idea of the meaning of this clause; but, having regard to the omission of the words "in the United Kingdom" in this clause, and to their presence in other sub-sections, I go so far with my colleagues as not to impose upon the words "any railway" the strictly geographical limit that it shall be a railway locally situated within the United Kingdom. But in this I speak only of the line, for we all agree that the institution, so to speak, as distinguished from the line, must be one constituted by British law. On the question whether a railway of which the line is outside these islands, though the company which works it is within them, is within this section, I am willing to admit that, on the words as they stand, the mere fact that the works of a railway company are outside, if the company is established by law inside, the United Kingdom, and is within our jurisdiction, will not exclude its stocks or shares from the section. There are some railway companies, such as the Great Eastern and the South-Eastern, whose earnings largely depend on sea-traffic outside the Kingdom, but I think it would be safe to follow the English authorities upon this question, and to hold that the line as well as the company must be British or Irish, as Byrne, J., and Gifford, V.-C., have held.

We are advising the Public Trustee as to the subject-matter on which he can lawfully exercise his discretion. But the Master of the Rolls has said, with regard to ordinary shares, that it would be very difficult to persuade him that such investments should be made, though he held them to be within the terms of the Act; and the Lord Chancellor has said that he

(1) [1903] 1 Ch. 352. (2) 38 L. J. Ch. 65.

concurs "in the strongest possible way in the weighty caution given by the Master of the Rolls," and he has added that "nothing in the present judgment can relieve the Public Trustee from the obligations attaching to the exercise of his discretion." With those warnings, the question of investing in foreign railways ought to be academic, for I should think that the Public Trustee will follow the safer course of confining his approval of investments to railways in the United Kingdom, when he knows that if he goes outside it, he must ascertain, at his own risk, that the laws and circumstances of the country where the line is are consistent with the law of this country, and with the security of the investments. The prudence of this course is enforced by the reasoning of the series of cases quoted by Mr. Jellett yesterday from Lord Eldon to Sir George Jessel, in which "*noscitur a sociis*" was applied to limit the operation of statutes of this sort, and Judges have refused to go beyond the limits of the Kingdom without express words. Let me point out also that, if the railway is outside the United Kingdom, its stocks and shares cannot have the full protection to be derived from the condition which we all accept, that the company shall be constituted under Parliamentary authority, because, no matter how the company is constituted, the property from which its earnings are derived, and which constitutes the security for investments in its capital, will not only not be within the jurisdiction of our Court, but will be subject to laws and to liabilities which the Public Trustee cannot fully know, but which it would be his duty to ascertain before sanctioning the investments. Even in the case of Colonial railways, it is difficult to ascertain the conditions on which the property was created, or is held, or administered, and these railways are held to be excluded. For example, the Canadian Pacific Railway Company is not only a vast landed proprietor, but also owns one of the most important lines of steam navigation across the Pacific. Under what conditions it holds its land, and under what conditions the Government can interfere with it, we do not know at present, and we cannot speculate for the future; and even if we do not hold that the geographical limit of the United Kingdom is imposed by the statute, the "weighty cautions" of the Master of the Rolls, and of the Lord Chancellor,

Appeal. 1905.

PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

Fitz Gibbon, L.J.

will probably keep the Public Trustee's discretion within those limits quite as strictly as if they were prescribed by statute.

But I now come to a point on which I differ most strongly, on the construction of the statute itself, from my colleagues, and also from the Master of the Rolls. I cannot accept the construction of sub-sect. (*f*) which includes the "ordinary shares," whatever they are, that are mentioned in that clause, in the authorized investments. In my opinion this clause is the mutilated remains of a similar clause occurring in several other Acts of Parliament, as well as in precedents of instruments, all subject to the same rules of construction. It is a common clause, which authorises certain investments, subject to the condition that they have what is called a certain "margin of safety" below them. The clause consists of two parts: a definition of the investment that is authorised, and a definition of the margin of safety, which is the prescribed condition of its authorisation. The qualifying margin of safety has been varied again and again, in statutes and in rules. The amount of the dividend, and the period during which it must have been continuously paid, range from a dividend of 3 per cent. to any dividend, and from ten years to three. How can such alterations be reconciled with treating fluctuating ordinary shares as being themselves authorised investments? It appears to me impossible to give this construction to sub-section (*f*) in face of the express words of the proviso, which show that the object of the whole business is to secure the sufficiency of the investment to realise the sum invested at a future time; a time that must be postponed for the uncertain period of at least one life, and may last until the termination of a trust covering any number of lives in being, and twenty-one years after the death of the last survivor. The Master of the Rolls has referred to the fluctuations in the value of ordinary shares. This fluctuation is inherent to the variation in the income to be derived from them, and so far as this clause is intended to give to the tenant for life a secure and permanent income during the time that the capital is tied up, the authorisation of investment in ordinary shares, producing an uncertain revenue, appears to me to be most improbable. The object of securing a regular income until the capital is required, and that of securing the full amount of the capital at

an uncertain future date, appear to me equally inconsistent with investment in ordinary shares. Even if authorised, would any prudent trustee buy them, for the purpose expressed in the proviso? Take the best of them—the London and North-Western of England, or the Great Southern and Western of Ireland—and see what would have happened to capital invested in them even seven years ago. If Colonial stocks were authorised, look at the fluctuations in the value of the best of them—the Canadian Pacific. It fell to 35 a few years ago. It is now about the same price—160—as the Irish Great Northern Ordinary Stock which we are asked to sanction. Is it possible to say that a security of that kind can secure the object of the investment—viz. the repayment of a fixed sum of money at a future time?

I am told that because the word "investment," as distinguished from "security," is used, a power to purchase ordinary shares is indicated. That argument completely vanishes on the words of the statute—"Purchase-money" is to be *invested* on mortgages secured upon rates, or *secured* upon investments in which trustees are authorised to invest trust funds, as well as upon "fully paid stocks or shares": the sufficiency of the investments to realise the sum invested is declared to be the common object of all those investments. Then section 52, sub-section 11, describes them all as "*securities* authorised in pursuance of the last preceding section."

In my opinion, neither equity, analogy, nor precedent can be found for treating the purchase of the fluctuating ordinary shares of a railway company as an investment of money on "security." A fundamental principle of equity is involved in this. Trustees empowered to invest money on landed security cannot purchase fee-simple lands, even at an apparent undervalue. The purchase of property is not the investment of money; and of all investments, those to be made under section 51 are most clearly meant to be investments of money as distinguished from purchases, because the repayment of the amount invested at the termination of the trusts is the result to be secured. For these reasons, I cannot hold ordinary shares to be authorised investments. I read the section as consisting of two parts: "fully paid shares or stocks of railways" are the authorised investments; "ordinary shares," paying

Appeal. 1905.

PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

Fitz Gibbon, L.J.

dividends for ten years, are the margin of safety for those investments. Let me not be supposed to shirk any difficulty. I admit that ordinary shares are "fully paid shares," but I say that the terms of the section show that the ordinary shares which pay dividend are excluded from the "fully paid shares" which are authorised as securities for the invested money. The margin of safety which is defined in this and in many similar clauses cannot, in the nature of things, be itself included in the investments which it is intended to secure.

I have nothing to add to the persuasive arguments of the Master of the Rolls upon the point of counter security for the sufficiency of the investments. The impossibility of working out a counter security in many cases is manifest. But I do not think that it would be in all cases impossible, or that it is in any sense illegal. Take the case of shares now at a premium, but redeemable hereafter at par. Under statutory powers, trustees can invest in such securities, though they involve payment of the premium out of capital, where they have a period to run sufficient to recoup the amount withdrawn from capital, or to justify the anticipation that the premium will be as high when they come to be realised as it was at the time of purchase. Possibly there might be a stock redeemable at a lower price before the termination of the trust, but otherwise a good investment. In such a case the Public Trustee might perhaps require counter security to make up the amount invested, but all that is necessary for us now to say is this—and we are all agreed on it—that any general practice of endeavouring to counter secure the authorised securities is not contemplated by the section. It means that the Public Trustee, by the exercise of his skill and discretion, must satisfy himself that it is a safe investment for the money—that is to say, it must be an investment into which a certain sum of money can be put with a reasonable prospect that the same sum can be got out again by realisation at the end of the time for which the investment is likely to continue.

I entirely agree with the opinion of the Master of the Rolls that all the sub-sections of section 51 are subject to the proviso which follows sub-section (*f*) just as fully as sub-section (*f*) itself, though it is printed as if it applied to (*f*) only.

I have done my best, in interpreting this Act, to confine myself to legal considerations; but having, unfortunately, had to learn, for another purpose, how it came to take its present shape, and how it was explained by those who passed it, I could not avoid some degree of interest in comparing the history of the clause, the explanation of it, and the observations by which it was forced upon more or less unwilling people, with the result of the present appeal.

I have to add a few words about an argument founded on sub-sect. (*g*), which, with all respect, I cannot follow. That sub-section authorises any investment which the rule-making authority sanctions under the Judicature Act, and we are asked to widen the interpretation of the preceding sub-section (*f*) on the ground that otherwise it would not bring in any investments not already sanctioned by the rules of Court, unless we admit ordinary shares. In the first place, this is not the case: in any view, (*f*) brings in many "fully paid stocks and shares" which no rule of Court has sanctioned. But, furthermore, the rule-making power, and the statutory power of investment have always been kept distinct, and they always overlap. They have no connexion with each other. The rules authorise many investments also authorised by statute. They generally authorise something more also, and the practice of the stockbrokers seems to put C., which stands, I suppose, for "Chancery," opposite securities authorised by rules only, while T., which means "Trustee," indicates those authorised by statute; but the construction of (*f*) cannot, in my opinion, be affected by the fact that anything done under it could also be done under rules which the rule-making authority can make or alter from time to time. The real question is—What is authorised by statute, which is immutable except by Parliament? What is at present authorised by rules may be changed at any time. We have on several occasions passed rules authorising securities peculiar to Ireland, which are not mentioned in the corresponding English Rules. If it be the case, and there is a great deal to be said for it, that the special circumstances of the Irish Land Purchase-money may call for a wider power of investment, the rule-making authority can make proper provision to that effect, but the existence of that power does not justify any peculiar construction of the statutory power of investment. If the rule-making

Appeal. 1905.

PUBLIC TRUSTEE *v.* BLACKER-DOUGLAS.

Fitz Gibbon, L.J.

authority does not exercise its power, it is for Parliament to say whether the Act should be amended; and on the vital points—first, of allowing investments outside the United Kingdom; and, secondly, of extending to other undertakings the authorization hitherto given for railway investments, it appears to me that it is for Parliament, and not for us, to consider the expediency and the conditions of the extension. A conveyancer employed to draft a power of investment would undoubtedly consider whether railway securities are not about the most vulnerable of their class, from the points of labour, difficulties of legislation, and increasing capital expenditure. They are not better protected than other institutions which possess fixed property of great value—Shipping Companies, Telegraph Companies, Building Companies, Industrial Companies, and the like. We have been told that Parliament rejected a proposal to extend this very section 51 to securities of that sort. If the extension is to be made, its limits must be considered and defined, as a prudent and skilful conveyancer would do for private owners, and we cannot attempt this.

I have endeavoured to construe this section according to its language, with due regard to the statutes in *pari materia*, to the course of the decisions, and to the object of the legislation, and the general result of my judgment is that, on the construction of the section, I agree with my colleagues except with respect to the ordinary shares, on which I am obliged entirely to differ; but, with respect to railways outside the United Kingdom, though not differing on the strict construction of the Act, I should advise the Public Trustee not to take the risk of sanctioning them.

HOLMES, L.J.:—

We have been told that section 51 of the Irish Land Act, 1903, did not form part of the bill as first submitted to Parliament, that it was introduced by way of amendment in committee, and that it was not until the original amendment had been altered in some important respects that the section assumed its present shape.

A provision arrived at by such a process as this is likely to present difficulties of construction; and the controversy that has

now arisen is some evidence that the history of the section given by counsel is correct.

The power of investment possessed by trustees, originally very limited, has been extended from time to time by statute; and section 51 was intended to be a further advance in the same direction in the case of proceeds of sales under the Act of 1903. The investments described in clauses (*a*), (*b*), (*c*), (*d*), and (*e*), while slightly enlarging the class of securities in which trustees are at liberty to invest their trust money, show no intention to depart from the safe and moderate lines on which previous legislation proceeded. They had, before 1903, power to lend to municipal and other local authorities on the securities of rates subject to certain conditions; and clause (*a*) brings in other investments of the same character. The Master of the Rolls held that this provision did not extend to moneys borrowed by the Kingstown Township, on the ground that this loan was not secured by bonds, debentures, or mortgages. We have had the advantage of a fuller examination of the rules prescribed by the Local Government under which these loans are made; and we are all of opinion that the investment possesses all the essential characteristics of a mortgage. It is charged on the rates; it is redeemable; and if default is made, the lender can, through a receiver, go into receipt of the income of the township on which it is charged. We are, therefore, obliged to allow the appeal in so far as it relates to this security.

It is unnecessary to make any remark on clauses (*b*), (*c*), (*d*), and (*e*), beyond pointing out that clause (*c*) enables investments to be made in the debentures of railways in the United Kingdom, irrespective of whether dividends have been paid on their ordinary shares or not. This change can be accounted for by the fact that the preference share capital of railway companies is often so large as to leave no dividend for the ordinary shareholder, while the preference dividends actually paid afford ample security to the holders of debentures.

I now come to clause (*f*) on which the really important points of controversy in the hearing of this appeal have turned. On the one hand, it is contended that, subject to a proviso, it empowers trustees to invest the trust money in the debentures and fully paid stocks (including ordinary stocks and shares) of any railway, home,

Appeal. 1905.

PUBLIC TRUSTEE v. BLACKER-DOUGLAS.

Holmes, L.J.

colonial, or foreign, which has paid for ten years dividends on its ordinary shares. On the other hand, it is argued that it does not include ordinary shares, and only authorises investments in railways situated in the United Kingdom.

Of these constructions, the first would, undoubtedly, go far beyond anything contained in or suggested by previous legislation. The second construction, however, would leave trustees in the same position as they were in before the statute passed. The clause would have no practical effect of any kind beyond endorsing a slight change made years ago by the rule-making authority in regard to Court investments, which change without clause (*f*) would be made applicable by clause (*g*) to trustee investments. The change I refer to consists of substituting "any dividend" for the 3 per cent. dividend on ordinary shares previously required as a condition without which debentures and preference stock are not trustee securities.

It is difficult to believe that the Legislature would make such a purposeless enactment, especially as debentures were already dealt with on a different basis by clause (*e*); but this difficulty is increased enormously by the proviso that follows—a proviso that is without precedent, as far as I am aware, and which can only be accounted for on the assumption that the section has introduced a drastic alteration in the law of trustee investments. This proviso has been read more than once. It requires the approval of the investment by a public officer; and it imposes on him a duty the performance of which will be especially onerous.

I have no doubt that it was originally intended that this proviso was to be confined to clause (*f*); and although words have been introduced making it applicable to all the previous clauses, I read it especially in connexion with clause (*f*).

I therefore feel myself bound to give that clause a construction which I think is the only one strictly consistent with its language, and which goes considerably beyond what has been urged by Mr. Jellett. I agree with the Master of the Rolls that it extends to ordinary paid-up shares as well as to debenture and preferred stock. The omission of preferred stock, which is to be found in all similar legislation, cannot be supplied by me. On this branch of the case I concur in the reasoning of the Master of the Rolls;

but I go farther than he in defining the class of railways to which the clause relates. I am of opinion that it applies to railways wherever they are situated; but, at the same time, I agree with the Lord Chancellor that they must be confined to railways belonging to companies created and incorporated under the law of the United Kingdom.

I have a few words to say about the proviso. I adopted, as we all do, the construction given by the Master of the Rolls to the word "secured" in this clause. It is equivalent to "established," and does not require or refer to counter-securities. I have already said that this proviso imposes on the Public Trustee a serious responsibility. In fact, it goes far to reduce the effect of the section to very moderate proportions, and it was probably so intended. The Public Trustee, not having the gift of prophecy, must have considerable courage and great optimism if he is satisfied that any investment, short of the very highest, will, at the termination of a trust which may endure for many years, realise the sum originally invested.

Solicitor for the Public Trustee: *J. G. Franks.*
Solicitors for the defendants: *Richardson & Synnot.*

G. Y. D.

Appeal.
1905.

May 9.
June 5.

In re TALBOT CROSBIE'S ESTATE (1).

Landlord and tenant—Land Purchase Acts—Land Act, 1903, *sections* 1, 24—*"Holding subject to a judicial rent fixed or agreed to since the passing of the Act of* 1896"—*Purchase agreement—Date of—Date of application for advance—Appeal—Jurisdiction.*

W., a first term judicial tenant, entered into an originating agreement with the vendor, pursuant to sect. 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, fixing the rent of the holding for the second term. This agreement and declaration were lodged in the Land Commission on the 30th March, 1904, and were filed on the 30th June following. The percentage reduction in the rent would bring the case within the zone limits in sect. 1 of the Land Act of 1903.

On the 30th April, 1904, W. and the vendor signed a purchase-agreement, under the Irish Land Act, 1903, for the purchase of the holding, which was lodged in the Irish Land Commission on the 26th July, 1904:—

Held, that sect. 24, sub-sect. 12, of the Irish Land Act, 1903, does not take away the general right of appeal from an order of the Judicial Commissioner to the Court of Appeal.

Held (2) (reversing the decision of Meredith, J.), that the date on which the application was lodged with the Land Commission, and not the date of the purchase agreement, was the date on which an "application was made for an advance" within the meaning of sect. 1, sub-sect. 1, of the Act of 1903; that the date of lodging the application was the date for determining whether the holding was "subject to a judicial rent fixed or agreed to since the passing of the Act of 1896," as mentioned in sect. 1, sub-sect. 1 (a), of the Act of 1903; and that the case was one in which the Estates Commissioners were bound to sanction the advance applied for.

This was an appeal *ex parte* from a decision of Meredith, J., dated the 23rd January, 1905, on a question submitted to him by the Estates Commissioners.

Mary Walsh was a first term judicial tenant. On the 7th March, 1904, an originating agreement and declaration were entered into between her and the vendor, pursuant to section 8,

(1) In the Court of Appeal, before Palles, C.B., and FitzGibbon, Walker, and Holmes, L.JJ.

sub-section 6, of the Land Law (Ireland) Act, 1881, agreeing to a second term rent, fixing the rent at £70 a year. This agreement and declaration were lodged in the Land Commission on the 30th March, 1904, and were filed on the 30th June following. The percentage reduction in the rent would be within the zone limits in section 1 of the Act.

On the 30th April, 1904, Mary Walsh and the vendor signed a purchase agreement, which was lodged in the Irish Land Commission on the 26th July, 1904.

The Estates Commissioners referred the following question to the Judicial Commissioner for decision. Is this holding, having regard to the date of the purchase agreement, a holding subject to a judicial rent fixed or agreed to since the passing of the Act of 1896, on which the Commissioners, pursuant to section 1 of the Act of 1903, are bound to sanction the advance applied for? Meredith, J., decided that the Estates Commissioners were not bound to sanction the advance, and the vendor appealed. See the case reported *ante*, p. 236.

Ronan, K.C., *Bourke, K.C.*, *Jellett, K.C.*, and *M'Elligott*, for the vendor.

June 5.

PALLES, C.B.:—

There are two questions for decision upon this appeal—(1) whether the appeal lies; (2) if so, whether the order appealed from is right?

The first question is one of which it is impossible to exaggerate the importance, as a decision upon it in the negative will restrict, to a material extent, the right of those interested in the vast mass of property which the promised Government advance of a hundred millions of money is bringing, and will continue to bring, under the jurisdiction of the Land Commission, to appeal to this Court on matters of law which, before the Act of 1903, existed in all proceedings under the Land Purchase Acts. No doubt such a decision would leave untouched appeals in relation to the distribution of purchase-money, but that distribution is but a part, and indeed a small part, of the proceedings under the Act of 1903, and the other proceedings not only may, but must,

Appeal. 1905. *In re* TALBOT CROSBIE'S ESTATE. Palles, C.B.

involve legal questions of much complexity and difficulty, of which that decided by the order under appeal may be taken as an example.

Whether the appeal lies, depends on two questions—(1) is the 22nd section of the Act of 1885 unrepealed, so far as it relates to proceedings other than those under section 24 of the Act of 1903? and (2) if so, is it applicable to the decision appealed from?

It is not suggested that this alleged repeal has been effected otherwise than by the Act of 1903, to the consideration of which I accordingly address myself.

The 103rd section of this Act expressly repeals the enactments mentioned in the schedule "to the extent mentioned in the third column of that schedule." That schedule mentions the Act of 1885, but the extent of its repeal is confined to part of section 5 and the entire of section 7. It does not embrace section 22, which, we may consequently assume, was deliberately omitted from the schedule.

This circumstance, although, of course, not conclusive, is *per se* sufficient to make one pause. Such an omission is perfectly consistent with the *partial* repeal of the section; but it is difficult to gather a total repeal by implication in an Act which shows that when the Legislature intended such a repeal it said so expressly. I therefore approach the consideration of the enactment which is said to have worked this implied repeal with a legislative caution that I should carefully scan it, to see whether it is not capable of some construction which will save the Legislature from the imputation of, at least, having been careless in its task.

Coming now to section 24, one of whose sub-sections (12) is said to have effected this repeal, I find that it follows a group of sections 1 to 23, headed "*Purchase and sale of estates*," which prescribe the duties of the "Estates Commissioners"—duties which are largely of an administrative character, and which contain a provision which I believe to be nearly, if not entirely, unexampled in relation to a body invested, as were the Estates Commissioners, with judicial functions, viz. section 23, sub-sect. 8.

The proceedings under these sections 1 to 23, are, by section 23, sub-section 8, directed to be carried into effect under the control

of the Executive Government, and terminate with the vesting of the estate in the purchaser, who thereby acquires an indefeasible estate in it, free from all claims. Then comes the 24th section, which is the first of three sections under a new heading, "*Purchase-money of Estates.*" It commences by a direction that, upon the vesting of the estate in the purchaser, the Land Commission *shall* pay the purchase-money into the Bank of Ireland, and *shall* make an order attaching to the purchase-money all claims which formerly affected the land sold. The section then proceeds, in an elaborate code of thirteen sub-sections, to define the jurisdiction and powers of the Land Commission in relation to the distribution of the purchase-money thus lodged—a jurisdiction eminently judicial, and one the exercise of which involves the determination of every question which can arise upon the title to the land sold.

Passing on from this section, we come to the 25th, the object of which is to prevent delay, and the 26th, which confers a power upon the Lord Chancellor. Thus terminate the sections under the heading, "*Purchase-money of Estates*"; and the Act then proceeds with a new group of sections, involving duties merely administrative, and headed "*General Finance.*"

Thus we find that the three sections under the heading "*Purchase-money of Estates*" constitute an enactment apart from, and differing in character from, the portions of the Act either preceding or immediately following it. Putting out of consideration section 25, which is little more than formal, and section 26, which affects the Lord Chancellor and not the Land Commission, we have the 24th section constituting a code in itself. *A priori*, one would expect that such a code would contain appeal clauses of a character different from those relating to other parts of the Act; and accordingly we find that the appeal clauses in the sub-sections now under consideration are coupled with the usual ancillary clauses abolishing *certiorari* and prohibition. *A priori*, also one would expect that all the provisions of this section would be confined to that which, not only by its heading, but by every sub-section other than the 12th, is shown to be its proper subject-matter, "*Purchase-money of Estates.*"

It is here necessary to consider the exact mode by which, at

Appeal. 1905.

In re TALBOT CROSBIE'S ESTATE.

Palles, C.B.

the time of the Act of 1903, decisions of the Land Commission could be reconsidered.

This depended upon the nature of the question involved. If it were a question of law, there was a direct appeal to this Court, under section 22 of the Act of 1885; and if that question had been determined by a Commissioner other than a Judicial Commissioner, then, under section 41 of the Act of 1896, the person aggrieved had the option, instead of appealing directly to this Court, of requiring the case to be re-heard by a Judicial Commissioner, retaining his right to appeal to this Court from the order of the Judicial Commissioner.

It was different when the matter involved was one of fact. From such an order no appeal lay to this Court, but the party aggrieved by such an order made by one Commissioner might, under the section I have last mentioned, require the case to be re-heard by three Commissioners, of whom a Judicial Commissioner should be one.

This being the state of the law, one object of sub-section 13 of the 24th section was to extend the right of appeal from decisions under that section to cases in which that which was in controversy was matter of fact, or matter of mixed law and fact. But it was plainly right, as some of the Commissioners need not necessarily have had legal training, that the appeal from an order made by them should not be direct to this Court, but should be from the order on the re-hearing, to which the Judicial Commissioner was a necessary party. Accordingly, sub-section 13 gives a plenary appeal to this Court from any decision under the section, on questions either of law or fact, of a Judicial Commissioner, or to which he was a party. This provision, coupled with section 41 of the Act of 1896, gave an indirect appeal to this Court against any decision *under the section* of any other Commissioner.

We have now to construe sub-section 12 in conformity with sub-section 13. In it we would expect to find that the provisions were limited to the subject-matter of this separate code, *i.e.* to proceedings under that section; and accordingly its commencement is so limited: "Proceedings by the Land Commission *under this section* shall not be removed into any Court, or restrained by any Court." Had the sub-section then proceeded,

"and save as provided by this section, no appeal shall lie from any decision of the Land Commission," I should have thought it clear that the subject-matter of the second limb was co-extensive with that of the first, and that "decision" was to be read "decision *under this section*." Nor can I think that it makes any difference that the saving clause rather inaccurately includes section 41 of the Act of 1896—a section which relates not to appeals but to re-hearings. The enactment, thus construed, has effective operation by abrogating, *in reference to proceedings as to which the fuller appeal* is given by section 24, the more limited and, as to them, now useless appeal under section 22 of the Act of 1885.

Upon the whole, then, having regard (*a*) to the absence of section 22 of the Act of 1885 from the schedule of repeals; (*b*) to the general scope of section 24, of which sub-section 12 forms a part; and (*c*) to the words of that and the following sub-section, I have, after some fluctuation of opinion, and with the diffidence incident to the doubts entertained by some of my learned colleagues, arrived at the conclusion that that section remains unrepealed, save so far as it relates to proceedings under section 24.

The second question upon which the appealable quality of the order depends is whether this 22nd section, which in its terms is limited to "proceedings under this Act," *i.e.* that of 1885, applies to such an order as the present, which could not have been made were it not for section 1 of the Act of 1903.

By section 100 of the Act of 1903, its part 1 is to be construed with "The Land Purchase Acts"; and Mr. Ronan, by going through a complicated labyrinth of Acts, has shown, to my satisfaction, that this expression, "The Land Purchase Acts" comprises, *inter alia*, that of 1885. This, however, to my mind, would not be enough if the effect of the Act of 1903 were to confer on the Land Commission a new jurisdiction, independent of that created by the Act of 1885, and if the proceeding were under that independent jurisdiction (1). Otherwise, of course, would it be if the subsequent Acts merely amended that of 1885, by removing

(1) *The Queen* v. *Wall* ([1898] 2 I. R. 769).

Appeal. 1905.

In re TALBOT CROSBIE'S ESTATE.

Palles, C.B.

fetters from, or improving the exercise of, the existing jurisdiction.

Now, the sub-section under which the application was made, viz. sect. 1, sub-sect. 1, of the Act of 1903, commences thus :—

> "In the case of the sale of an estate, whether to the Land Commission or otherwise, *when an application is made for an advance under the Land Purchase Acts* of the whole purchase-money of a holding, and the Land Commission are satisfied" of certain facts, they "*shall* sanction the advance."

The jurisdiction, therefore, to sanction the advance is to be exercised on an application for an advance under the Land Purchase Acts of the whole purchase-money of a holding. What jurisdiction has the Land Commission to entertain an application for an advance of the whole purchase-money? I have traced back the Acts, and I find that, under the Act of 1885, section 2, the Land Commission may make an advance to a tenant who is purchasing his holding of the whole principal sum or price payable by the tenant, if the repayment of the advance is secured by a deposit, if the Land Commission are satisfied with the security in other respects, and if the aggregate amount of the advances does not exceed five millions sterling. All these conditions and limitations have been since removed.

The Act of 1896, section 29, enables the Land Commission to dispense with the guarantee deposit. Section 1, sub-sect. 1, of the Act of 1903, deprives the Land Commission of the power of inquiring into the adequacy of the security; and the Acts of 1888, 1891, and 1903 extend the limit of the aggregate of advances.

The various Acts now constituting "the Land Purchase Acts" alter in a variety of particulars the conditions on which the advances are to be made, the public security which is to be afforded for the same, and the powers of the Land Commission for recovering them; but it seems to me that, amended and altered as it may have been, the jurisdiction to sanction an advance rests upon the Act of 1885 in this sense, that, were it repealed, the jurisdiction would be at an end.

This being so, the application in the present case is "a

proceeding under the Act," *i.e.* that of 1885, and consequently one in which an appeal lies to this Court from a decision on a question of law.

The second question is whether the order of Meredith, J., is right. As upon this question the Court is, happily, unanimous; and as it depends upon a few words of one section of the Act, my judgment upon it will be brief.

In the first instance, then, I desire to adopt and emphasize the observation of that learned Judge (made in answer to a question by Mr. Jellett), that the first section of the Act of 1903 contemplated that the transactions which were to come within it should be *real* transactions. It is essential to the proper working of the Act that this should be thoroughly understood and acted upon. At the same time, Mr. Justice Meredith expresses the strongest opinion that the agreement in the present case was *bona fide*. This, in my view, is a cardinal matter here, and I shall therefore read Mr. Justice Meredith's very words:—

> "Mary Walsh was the tenant of a judicial tenancy, the fair rent of which had been fixed for a first statutory term. . . . The term began in 1884 and ended in 1899, and the agreement and declaration signed upon the 7th March, 1904, was therefore signed at a correct date. The first statutory term had expired, and the parties were entitled to proceed to have a judicial rent fixed for a second term, . . . and the second term rent fixed by the agreement and declaration was £70, . . . and on the figures it would certainly appear that the case was not merely *bona fide*, but that the rent proposed to be fixed as the judicial rent for the second statutory term was, on the view, an extremely fair one. . . . I entertain no doubt that if the purchase agreement had been executed on the 1st July, 1904, the case would come within the mandatory provision of sect. 1 of the Act, and the Estates Commission would be bound to sanction the advance."

The execution of the purchase agreement, however, was not delayed until the 1st July, 1904. It was signed on the 30th April, 1904, and was in a form prescribed by the rules, which strangely, as it seems to me, embodies in the one document two instruments wholly different in their nature—viz. the purchase agreement, and the application for an advance. So far, however, as this document was an application for an advance, it was not acted upon until long after the 1st July, viz., on the 26th of that month; and if,

Appeal. 1905.

In re TALBOT CROSBIE'S ESTATE.

Palles, C.B.

during any one of those twenty-six days of July, the document, which still continued to be in the hands of the parties, had been re-executed by them, the question here would not have arisen.

Was it, then, essential to have the document re-executed on or after the 1st July, and before its lodgment in the offices of the Land Commission on the 26th July? The gist of Mr. Justice Meredith's judgment is to be found in the following sentence—

> "I cannot help thinking that, upon the true construction of the section, the Legislature intended, and I hold their intention to be, that the landlord and tenant, *at the date* of the purchase agreement, *which is* the 'application' for an advance, should deal with a state of facts actually existing, and not with a state of facts which might thereafter come into existence."

Now, so far as this sentence decides that when the "*application*" is made, the state of facts necessary to give the Land Commission jurisdiction to entertain and determine it should have actual present existence, and not be one which might thereafter come into existence, I respectfully agree with Mr. Justice Meredith; and therefore had the "application" here been lodged in Court on the 29th June, I should have agreed in the conclusion at which he has arrived. But (and here, in my opinion, is the error in his reasoning) he treats the purchase agreement and the application as the same thing. "At the date," he says, "of the purchase agreement, *which is* the application"; and it is for this reason I think that he holds that the state of facts which must exist at the time of the application must exist at the time of the agreement for purchase. I am unable to agree in this. It is, to my mind, most unfortunate that these two several instruments, wholly different in their incidents, are, by the prescribed forms, directed to be in one document, or rather, to be in one paper; but even when in one document, the legal effect of each must be determined by its nature.

So far as the document contains an agreement, the purchase agreement, it becomes operative from its execution. But a "application" to a Court does not become operative merely when the paper by which it is to be made is signed, if signature is necessary; nor when one party agrees with another to make it. It operates from the moment of its being made in the prescribed

form *to the Court*, *i.e.* here, by its lodgment with the proper officer. It is an *act in Court*. Therefore, I feel coerced to differ from Mr. Justice Meredith when he holds that the purchase agreement *is* the application, or that the date of the first is the time when the other is made.

I am of opinion that the agreement is one of the 30th April, 1904, and that the application is one of the 26th July, 1904.

I now have to consider the purchase agreement. I agree that the document, so far as it is a purchase agreement, must either, at the moment of its execution, be one which answers the description of section 1, sub-sect. 1 (*a*), of the Act of 1903, or must be such as is capable of thereafter answering that description, and which, in event, and *before the application*, does answer that description. At the time of its execution it must either actually or potentially, and at the time of the application it must actually answer, the description. Admittedly it actually answered the description at the time of the application. At that time the rent had admittedly become a "*judicial rent*," agreed to since the passing of the Act of 1896. Was it at the time of the purchase agreement capable of thereafter answering the description? Section 8, sub-sect. 6, of the Act of 1881 enables the landlord and tenant of a tenancy, subject to a statutory term, during the last twelve months of such term, by writing under their hands, to agree and declare what is then the fair rent of the holding; and such agreement and declaration, "*on being filed in Court in the prescribed manner*, shall have the same effect as if the rent so agreed on were a *judicial* rent fixed by the Court under the provisions of this Act." In the present case the rent was "agreed to" before the execution of the purchase agreement, and required only the formalities of the rent agreement being filed in the prescribed manner to make it "a judicial rent" "agreed to." Thus, before the application to the Court, the agreement had assumed the character which was necessary to bring it within section 1, sub-sect. 1 (*a*), and which gave the parties to it a *status* and a right to apply to the Court. Irrespective of all questions of relation back, I am of opinion that the appellant was, on the 26th July, 1904, *rectus in curiâ*, and that the Estates Commissioners were *bound* to grant the application.

If the purchase agreement had been re-executed on the 1st

Appeal. 1905. *In re* TALBOT CROSBIE'S ESTATE. Palles, C.B.

July, or if upon that day a new agreement identical in its terms with that of the 30th April had been executed, the legal rights of the parties would have been, on the 2nd July, 1904, identical with those which, in the events which have happened, actually existed.

Such re-execution or execution would have been absolutely without effect, and the right which Meredith, J., admitted would have existed in the case of such re-execution, must, in my opinion, inevitably have existed although there was no such re-execution.

For these reasons, I am of opinion that Mr. Justice Meredith's order should be reversed.

It is right to say that clause 1 of the prescribed form of agreement, which does not provide any limit of time within which the estate may be sold, might (having regard to *London and South-Western Railway Company* v. *Gomm* (1)) usefully be reconsidered. I have assumed the agreement to be a valid one, as it was on that basis the question was put by the Estates Commissioners.

FITZGIBBON, L.J. :—

The question of our jurisdiction is of the highest importance. The appeal is brought from a decision of the Judicial Commissioner upon a question of law referred to him by the Estates Commissioners—namely, "Whether, upon the admitted facts and dates, the sale of Mary Walsh's holding was within the mandatory provision of the Act of 1903, section 1 (1) (*a*), entitling her to an advance of the purchase-money from the Land Commission?" The Judicial Commissioner has held that she was not so entitled.

The provisions of the Land Acts and of the Land Purchase Acts, as to appeals from other members of the Land Commission to the Judicial Commissioner, from the Judicial Commissioner to this Court, and from this Court to the House of Lords, are so complicated that differences of opinion as to their interpretation and effect might well be expected. I agree with the Lord Chief Baron that an appeal lies in the present case.

To show the grounds of this conclusion I must trace the laby-

(1) 20 Ch. D. 562.

rinthine course of legislation from the Act of 1881 to the Act of 1903, of which sect. 100 (1) enacts that Part 1 of that Act shall be construed as one with "the Land Purchase Acts," and sect. 98 enacts that the expression "the Land Purchase Acts" includes Part 3 (sections 25 to 42) of the Act of 1896, of which sect. 50 (4) enacts that Parts 2, 3, and 5 of that Act shall be construed as one with *the Land Purchase Acts as therein defined*; and sect. 48 (1) enacts that in the Act of 1896 the expression "Land Purchase Acts" *means* the Purchase Act, 1891, *the Land Purchase Acts as therein defined*, and the Redemption of Rent Act, 1891. The Purchase Act, 1891, sect. 42, enacts that "Land Purchase Acts" *means* a number of Acts, including the Land Act, 1870, parts 2 and 3, the Land Act, 1881, parts 5, 6, and 7, the Land Purchase Acts, 1885 and 1888, and the Purchase Amendment Act, 1889.

All these Acts, save so far as they have been repealed, must therefore now be construed as one with the Act of 1903, Part 1, upon which the decision now under appeal was given.

We are directly concerned with the "Land *Purchase* Acts" as thus defined, and not with the "Land Acts," otherwise called "the Land *Law* Acts," save so far as they are included in the definition of the Land Purchase Acts; but they may supply arguments by analogy to assist the interpretation of the Purchase Acts.

Before referring to the Acts in detail, I may state, in general terms, the conclusion which seems to me to give the most consistent interpretation to the provisions relating to appeals.

In my opinion the Judicial Commissioner is throughout regarded as a Judge of the High Court of Judicature; and as the Referee of the Land Commission upon questions of law, in every case in which *a question of law* is submitted to him for hearing and determination, I think that an appeal lies from his determination to this Court, and that the decision of this Court is, in general, final and conclusive; but express provision to the contrary is made in certain cases, as in the Act of 1903, section 24; and an appeal to the Lords is possibly given by implication where the Judicial Commissioner is empowered by the Act of 1903, section 71, to refer questions of law to any Division or Judge of the High Court.

Appeal. 1905. *In re* TALBOT CROSBIE'S ESTATE. Fitz Gibbon, L.J.

By the Act of 1881, section 4, the Judicial Commissioner is made an additional Judge of the Supreme Court. By the Purchase Act, 1891, section 28 (4), any Judge of the High Court may be nominated as an additional Judicial Commissioner, with the same jurisdiction for determining any question of law as the Judicial Commissioner, for the purposes of the Land Purchase Acts. By the Act of 1896, section 23 (1), rules may be made, *inter alia*, (*b*) to enable the Judicial Commissioner to exercise any jurisdiction of the High Court or any Judge thereof; and (*c*) to enable the High Court to distribute the proceeds of any sale under the Land Purchase Acts, a description by anticipation of the subject-matter of the Act of 1903, section 24. By the Act of 1896, section 23 (2), the Land Judge is deemed an additional Judicial Commissioner, and the Judicial Commissioner is deemed an additional Land Judge, and by the rules the Judicial Commissioner has all the jurisdiction of the High Court or any Judge thereof, and of the Land Judge of the Chancery Division.

By the Act of 1903, section 71, the determination of any question of law arising under the Land Purchase Acts may be transferred by the Judicial Commissioner, if he thinks fit, from the Land Commission to any Division or Judge of the High Court, and any such determination shall have the effect of, and be subject to, the same right of appeal as a *final order of the High Court.* Under the Judicature Act (subject to certain defined exceptions) an appeal lies to this Court from every such order, and it would seem to require special words to prevent a further appeal to the House of Lords. But we are not now concerned with that question.

A priori, this section seems to render it almost incredible that the discretionary transfer of a question of law by the Judicial Commissioner, himself a Judge of the High Court, to any Division, or to another Judge of the same Court, is required to create an appeal to which his own determination of the same question would not be liable; or that his not thinking fit to make the transfer should deprive the applicant of an appeal, and should make his own determination final.

The Purchase Act, 1891, section 28 (8), provides that any

Commissioner, meaning any Land Commissioner, in carrying the Land Purchase Acts into effect may submit any question of law arising under the said Acts for the hearing and determination of the Judicial Commissioner. When that Act passed, the Act of 1885, section 17, was in force; and it provided that any person *might require* that any question of law arising under that Act should be heard and determined by the Judicial Commissioner. Though this provision was repealed by the Act of 1896, schedule 2, section 41, of that same Act gave a wider right of appeal, and that section, being in part 3, is incorporated with Part 1 of the Act of 1905, which Act repeals other sections of the Act of 1891, but does not repeal section 41.

To realise the effect of this section 41, we must remember that the Purchase Act, 1885, section 22, enacts that any person aggrieved by a decision made on a question of law in proceedings under that Act had the right to appeal from such decision to this Court, and that the Act of 1896, section 41, itself enacts that any person aggrieved by an order of a Land Commissioner acting alone in carrying the Land Purchase Acts into effect, if the Judicial Commissioner was not a party to the order, and if the question was one of law, may require it to be re-heard by the Judicial Commissioner. There is no provision that his determination on such re-hearing shall be final, and both these sections are to be read as one with the Act of 1903 (Part 1).

The Act of 1903, section 23 (1), vests the jurisdiction under the foregoing provisions of that Act in three members of the Land Commission, called "the Estates Commissioners," and provides that any question of law (unless frivolous) shall, on application, be referred to the Judicial Commissioner. I can find nothing in any Purchase Act to exempt his decision of questions of law so referred, from the appeal to which his decision of like questions is, in all other cases, subject.

For these reasons, I hold that the determination of every question of law (not being frivolous) by the Judicial Commissioner under the Land Purchase Acts is subject to an appeal to this Court; and, while I rest this conclusion on the Act of 1896, section 41, and the Purchase Act, 1885, section 22, it seems to me to be fortified as well by the analogy of the provision of the Land

Appeal. 1905. *In re* TALBOT CROSBIE'S ESTATE. Fitz Gibbon, L.J.

Act, 1881, section 48 (1), which requires the Land Commission on application to state a case on any question of law not being frivolous, and to refer the same for the consideration and decision of the Court of Appeal, as also by the *status* of the Judicial Commissioner as a Judge of the High Court, and by the existence of an appeal from the decision of any Division, or of any other Judge of that Court, upon any question of law referred under the Act of 1903, section 71.

The suggestion that the Act of 1903, section 24, takes away this right of appeal, seems to me to be completely answered by observing that this section is confined to the distribution of the proceeds of any sale under the Land Purchase Acts, and that this case is not within that section, of which the head-line is "Purchase-money of Estates" and the marginal note is "Distribution of Purchase-money," while the body of the section defines the cases to which it applies, and the time at which it comes into operation—namely, when the land has been converted into money. Sub-section 1 deals with the case of the *sale* of an estate to persons other than the Land Commission, *so soon* as a holding or parcel of land comprised in the estate is vested in the purchaser; sub-section 2 deals with the case where *land is vested* in the Land Commission, or where *money is paid* into the Bank of Ireland; and all the subsequent sub-sections deal with the purchase-money into which the land is assumed to have been converted before the section comes into operation.

Sub-section 11 gives the additional powers of the High Court to the Land Commission, but only for the purposes of the section.

The provision of sub-section 12, which enacts that no appeal shall lie from any decision of the Land Commission, is expressly limited to proceedings *under that section*, and it saves the right of appeal provided by the Act of 1896, sect. 41. There may be some difficulty in giving effect to this saving in cases within the section, but I fail to see how it can take away the right of appeal in any case outside the section; and sub-section 13 expressly gives an appeal to this Court from any decision under that section given by a Judicial Commissioner, or to which he is a party, and it enacts that the decision of the Court of Appeal of any question *other than one of law* shall be final. This seems to me to imply

that the decision of this Court, under section 24, on any question of law, is not final, and the only way in which I can reconcile this with the other sections, as well of the Land Law Acts, as also of the Land Purchase Acts, which make the decisions of this Court conclusive in certain defined cases, is by limiting the operation of every clause of section 24 to proceedings *after sale*, and to dealings with *purchase-money* as distinguished from land.

I cannot concur with the Judicial Commissioner in his answer to the question submitted to him, though I entirely agree with the concluding passage of his judgment (1) that the Act of 1903, sect. 1, in making it mandatory upon the Land Commission, in cases within what are called "the zones," to advance the price agreed upon between the parties, certainly contemplated that the transactions were to be real transactions. It is for the Land Commission, and not for the Judicial Commissioner or for us, to ascertain the "reality" of every sale for which an advance is sanctioned, but I would say that every tenancy sold must be a real tenancy, and not a tenancy created conditionally, or for the mere purpose of getting money from the State.

The admitted facts and dates on which the questions of law have been submitted in this case must be taken to include the fact that the transaction by which Mary Walsh agreed to purchase her holding was real in every sense, and strictly within the words of the section, if the holding was subject to a judicial rent at "the crucial date." The very proportion between her first and second term rents goes to show that the second term rent was honestly fixed at a reasonable figure, and unless I am greatly mistaken, in many if not most of the cases in which the prices of second term rents are treated as within the zones, the prices would be below the zones if taken on the basis of the first term rents.

But, however that may be, I cannot agree that the date of the purchase agreement is the "crucial date" for determining whether the holding is "subject to a judicial rent fixed or agreed to since the passing of the Act of 1896." The section itself fixes the date "when application is made for an advance under the Land Purchase Acts" as the crucial date.

(1) [1905] 1 I. R. 246.

Appeal. 1905.

In re TALBOT CROSBIE'S ESTATE.

Fitz Gibbon, L.J.

When the agreement was signed, Mary Walsh, as between herself and the landlord, held at a rent fixed after 1895; the agreement fixing that rent had already been lodged with the Land Commission, and had been filed; before the application for the advance was made to the Land Commission, that rent had become "judicial" in every sense. There is no suggestion that Mary Walsh was not then a "real tenant" at that rent, or that either her tenancy had been created, or her second term rent had been fixed, with any unreal purpose or any indirect object.

Though the prescribed form combines the words of agreement to purchase with the words of application for the advance, the statement of the tenure and rent are merely particulars or words of description, and the purchase agreement and the application are in law and in fact distinct and different things, and the dates of them are different, unless the signing of the agreement and the lodging of the application with the Land Commission take place on the same day.

Regarded merely as an agreement to purchase, it seems to me to be more than doubtful whether this composite document has any validity, or, at all events, whether it becomes enforceable or irrevocable, unless and until the advance of the purchase-money has been sanctioned by the Land Commission. The agreement to purchase is expressly conditional upon the sale being carried out under the Purchase Acts. Though it is in terms a present agreement to sell it is expressly conditional, and it takes effect if, *but only if*, the holding is afterwards sold at a time undefined, and on terms over which the parties have no control, and which do not become practicable unless and until the advance is sanctioned by the external authority of the Land Commission.

The London & South-Western Railway Co. v. *Gomm* (1) is a strong authority to show that such an agreement is void. This question would become vital if the Land Commission now attempted to force a sale upon the basis of the terms being outside the zones, against the intention of both landlord and tenant; but holding, as I do, that the date of the application for the advance, namely, the date of the lodgment of the composite document with

(1) 20 Ch. D. 562.

the Land Commission, is the date at which the *status* of the tenant is to be ascertained, I express no final opinion upon any other question; and as, on that date, Mary Walsh was in occupation of her holding, subject to a judicial rent agreed to since the passing of the Act of 1896, the terms of sale being within the figures, I hold that her purchase was within the operation of the Act, 1903, sect. 1 (1) (*a*), and I hold that the Estates Commissioners must be taken, in stating their "question of law," to have assumed that "the admitted facts and dates" bring Mary Walsh's case in all other respects within the section.

It is right to say that her case was considered by the Judicial Commissioner in conjunction with a number of others. The appeal is limited to her case, and nothing that I have said can be taken to apply to any other case, of which all the "facts and dates" are not before us.

WALKER, L.J.:—

I entertained great doubt during the arguments as to whether an appeal lies in this case—a doubt which is not wholly removed yet; but as all the other Judges hold that there is an appeal, it is not my wish to press my doubts in the matter to dissent. So I accept, with pleasure, the view that an appeal does lie, and I am glad that it has been so held. The moment that has been held, I agree in the decision on the part of the order of Meredith, J., appealed against in this case of Mary Walsh. Her case is free from the suggestion of a sham tenancy, attracted into the zones for a sham purpose.

HOLMES, L.J.:—

I am in the same position as Lord Justice Walker. If I were to act on my own judgment, I fear that I should be obliged to hold that this appeal does not lie. Indeed, I wrote a judgment leading to this conclusion; and although the judgment of the Lord Chief Baron has caused me considerable doubt, my conversion is not complete. At the same time, I am satisfied that, in existing circumstances, I ought to withdraw my own opinion. It would be unfortunate if this appellate Court were equally divided as to whether it can hear an appeal in a class

Appeal. 1905.

In re Talbot Crosbie's Estate.

Holmes, L.J.

of cases which must frequently arise, especially when the right of further appeal is doubtful. Two members of the Court have arrived at a clear conclusion, which I am satisfied to accept; and I do so the more readily as I have no doubt that the present appeal, if it lies, ought to be allowed for the reasons already fully given.

Solicitors for the vendor: *Moore, Keily, & Lloyd.*

R. D. M.

M. R. 1905.

April 18. May 2, 17.

THOMPSON *v.* HURLY.

(1887. No. 9039.)

Statute of Limitations—Administration of real and personal estate—Claim upon covenant in mortgage deed—Amount of interest recoverable—3 & 4 Wm. 4, c. 27, s. 42—37 & 38 Vict. c. 57, s. 8.

In 1858 A borrowed a sum of money from the trustees of a settlement on the security of a charge on the lands of X. A having died in 1887, a decree for the administration of his real and personal estate was made in an action brought by B, his executrix, against C, his eldest son and one of his next-of-kin. No claim was made by the mortgagees in the action, which, by consent, was not proceeded with.

Interest on the mortgage debt was paid out of the lands of X down to 1895 by B, who died in 1892, and afterwards by C, who was executor of B and owner of the charge.

The lands having proved insufficient to pay the interest, application to revive the action was made by the trustees of the settlement, in order to prove for principal and interest under the covenant. C, the defendant, objected that the claim was barred by the Statute of Limitations:—

Held, that, although the decree did not prevent the statute from running, the payment of interest kept the debt alive; but that only six years' arrears of interest was recoverable, it being a sum of money chargeable upon land within 3 & 4 Wm. 4, c. 27, s. 42. An order was accordingly made to continue the proceedings in the name of C, executor of B, as plaintiff, and of the trustees as co-defendants with the defendant C.

Motion.

This was an application on behalf of William Rowan and William Ruby Hefferuan, creditors of John Hurly, deceased,

whose estate had been the subject of an administration decree in this Court, for liberty to continue the proceedings with a view of proving against his real and personal estate on the covenant in a mortgage.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

This case came before the Court in the form of a motion by William Rowan and the Rev. William Ruby Heffernan, to revive the action and continue the proceedings; but on the hearing of the application it appeared that there was a substantial question of law to be decided, and both parties, the applicants and the defendants, agreed, and the Court was asked by them, to decide the question before making an order on the motion.

The action was for the administration of the real and personal estate of John Hurly. The plaintiff was Lucy Anne Thompson, and the defendant John Charles Denis Hurly. The proceedings came to an end before the death of the plaintiff, Miss Thompson, by a consent which was entered into. Nothing has been done since, and the suit has abated by her death. The applicants claim to be creditors of John Hurly under a mortgage made by John Hurly of May 19th, 1858, to secure the repayment of certain trust moneys advanced to him by the then trustees of a settlement of April 11th, 1836, executed on the marriage of John Collis with Melicent Agnes Blennerhassett. The parties to the settlement were Thomas Collis, of the first part; John Collis, his son, of the second part; Edward Collis, of the third part; Rowland Blennerhassett, of the fourth part; Melicent Agnes Blennerhassett, of the fifth part; and the Rev. Robert Conway Hurly and John Hurly Blennerhassett, of the sixth part. It was thereby agreed and declared that the Rev. Robert Conway Hurly and John Hurly Blennerhassett should stand possessed of the sum of £2500 and the securities for the same assigned and transferred to them, as was therein mentioned, upon the trusts therein set forth; and the said John Collis was empowered to appoint the said sum of £2500 amongst the younger children of the marriage, subject to the payment of the interest of the said sum to the said John Collis during his life. By deed of April 1st, 1850, made between the said John Collis, of the one part, and Richard Francis Blennerhassett and

M. R. 1905.

THOMPSON *v.* HURLY.

Rowland Tallis Eagar, of the other part, the said Richard Francis Blennerhassett and Rowland Tallis Eagar were appointed new trustees of the settlement of 1836, pursuant to the power therein contained, and the £2500 was vested in them. By order in Chancery of May 8th, 1855, the Rev. John Kerin was appointed a trustee of the settlement in the place of Rowland Tallis Eagar, removed by order in Chancery of February 15th, 1845. By deed of May 8th, 1855, made between John Collis, of the one part, and Robert Conway Hurly and the Rev. John Kerin, of the other part, Robert Conway Hurly was appointed a trustee of the settlement in the place of Richard Francis Blennerhassett, and the trust funds, then consisting of the sums of £1607 13*s.* 4*d.* and £1001 10*s.* 9*d.*, were transferred to Kerin and Hurly as such trustees.

Then came the transaction in question, on which the present claim arises. By mortgage of May 19th, 1858, John Hurly, the testator in this action, assigned to Robert Conway Hurly and John Kerin (the trustees of the settlement), their executors, administrators, and assigns, a sum of £5000, charged on the lands of Aglish by a term of 2000 years, created for the purpose of securing the said charge, to secure repayment of £1390 16*s.* 5*d.*, portion of the said trust funds lent to him by Hurly and Kerin, with interest thereon at the rate of five per cent. per annum. The mortgage contained a covenant that John Hurly, his heirs, executors, and administrators, would pay to the said Robert Conway Hurly and John Kerin, their executors, administrators, and assigns, on the 19th November, 1858, the said sum of £1390 16*s.* 5*d.*, with interest thereon at the rate of five per cent. per annum, with interest at the same rate so long as the said sum remained outstanding and unpaid.

Robert C. Hurly died on September 11th, 1870, and the Rev. John Kerin on March 4th, 1873. By settlement of January 20th, 1865, executed on the marriage of the Rev. William Ruby Heffernan with Agnes Lucy Collis, daughter of John Collis, one-fourth of the £2500, including one-fourth of the said sum of £1390 16*s.* 5*d.* mortgage money, was appointed to Agnes Lucy Collis, and put in settlement by her in trust, *inter alia*, for the Rev. W. R. Heffernan for life. The last surviving trustee having died in 1873, William Rowan (one of the applicants) and Charles

Chute were, by deed of November 11th, 1879, appointed new trustees of the settlement of 1836. Very curiously, if the statement in the affidavit be correct, Charles Chute died on the same day, November 11th, 1879.

Thus, William Rowan was left sole trustee of the settlement, and so continued until April 22nd, 1905, when Thomas C. Goodman was appointed trustee along with William Rowan. On this occasion the mortgaged premises were vested in them, which had not been done on the occasion of the appointment in 1879. In these circumstances the lands of Aglish, on which the sum of £5000 was charged, were security for £1390 16*s.* 5*d.* and interest. In 1885 a petition for sale of the lands of Aglish was presented in the Land Judge's Court, and an order for sale made. In 1902 part of the lands were sold to tenants; part is as yet unsold. It is admitted that the proceeds of sale of all the lands when sold will be insufficient to meet the demand of the applicants. Accordingly, they seek to enforce their claim on the covenant in the mortgage in this action against the assets, real and personal, of John Hurly, deceased. John Hurly died on November 7th, 1878. Lucy Anne Thompson was his executrix. A decree for the administration of the real and personal estate of John Hurly was made in this action on February 2nd, 1887. The proceedings were stayed by an agreement made in March, 1889. The claim now made is to recover £1390 16*s.* 5*d.* principal, and £1256 10*s.* 2*d.* interest, on foot of the covenant in the mortgage.

It is only necessary to add to the above statement that the defendant became entitled to the lands of Aglish on the death of an uncle, and that the appointment of new trustees in April, 1905, referred to by the Master of the Rolls, was made by deed by the executrix of the tenant for life under the settlement, pursuant to a power therein contained, and the property vested in the new trustees pursuant to the Trustee Act, 1893. This appointment was made pending the motion, in order to get rid of the objection of the defendant that the legal estate was outstanding in the personal representative of the surviving trustee when raised, and that the applicants had no power to sue.

The arguments are sufficiently stated in the judgment of the Master of the Rolls.

M. R. 1905.

THOMPSON v. HURLY.

P. D. Fleming, K.C., in support of the motion.

Matthew J. Bourke, K.C. (with him *Ronan, K.C.*), for the defendant.

The following authorities were cited: *Megginson* v. *Harper* (1); *Bermingham* v. *Bourke* (2); *Chinnery* v. *Evans* (3); *Sutton* v. *Sutton* (4): *Fearnside* v. *Flint* (5); *Leahy* v. *De Moleyns* (6); *Finch* v. *Finch* (7); *Steward* v. *England* (8); *Ebbs's Estate* (9); *Penfield* v. *M'Murdo* (10); *Beattie* v. *Cordner* (11): Darby & Bosanquet on the Statute of Limitations, p. 569; also 3 & 4 Wm. 4, c. 27, s. 42; 37 & 38 Vict. c. 57, s. 8.

May 17.

THE MASTER OF THE ROLLS, having stated the facts above mentioned, proceeded as follows:—

Two points are made by the defendant against the applicants: first, their right to sue on the covenants is denied. This was before the appointment of new trustees in April last, to which I have referred. It was said that the personal representative of the surviving trustee was the person in whom the legal estate was vested; that there was no vesting of the estate in the trustees appointed in 1879, and therefore no right to sue. I am not at all sure that that would prevent the parties beneficially interested from suing. The mortgage was an equitable security, as there was a prior mortgage on the charge. I am not sure that the *cestuis que trustent* could not maintain an action, or give a good discharge, even if there was no personal representative of the surviving trustee. But this point is admitted to be got rid of now by the appointment of new trustees in April, 1905, and the vesting of the mortgaged property in them.

The second point, which is more important, is that of the Statute of Limitations. The *prima facie* case under the statute which exists is met in two ways:—First, it is said that the decree

(1) 2 Cr. & M. 323.
(2) 2 J. & L. 699.
(3) 11 H. L. Cas. 115.
(4) 22 Ch. D. 511.
(5) *Ibid.* 579.
(6) [1896] 1 I. R. 206.
(7) 45 L. J. Ch. 816.
(8) [1895] 2 Ch. 820.
(9) 31 L. R. Ir. 95.
(10) [1902] 2 Ch. 684.
(11) [1903] 1 I. R. 10.

of February 2, 1887, to administer the real and personal estate of John Hurly prevented the operation of the statute in respect of the claim under the covenant in the mortgage of May 19, 1858. The statute of 1874 commenced on January 1, 1879. There is no reason to contend, nor was it argued, that on the evidence the debt was barred then; and so it was argued that the decree enured for the benefit of the present claim, operating as a judgment in favour of creditors, as in *Finch* v. *Finch* (1). That, however, was a suit by a legatee, that is, a suit against an executor, involving the ascertainment and payment of debts before the plaintiff could obtain anything. This is not such a suit. It is in no sense a suit for the recovery of the demand sought to be taken out of the statute. In Darby & Bosanquet on the Statute of Limitations, p. 566, the law is thus stated:—"The action, by whomsoever commenced, must, to come within the reasoning of the cases, be in its nature one for the recovery of the demand sought to be saved from the bar of the statute; and, therefore, if in a foreclosure action an inquiry is directed as to incumbrances, no incumbrancer coming in under the decree can get any benefit from the commencement of the action, so far as the Statute of Limitations is concerned."

Therefore, in *Thompson* v. *Hurly* it could not be said that the action was one for the recovery of the demand sought to be saved from the bar of the statute. It is the business of an executor not to diminish the assets, but to increase them if possible. It is not his business to be astute that doubtful claims should be established against the assets of the testator. I need not dwell on this, however, as I am of opinion that the applicants are not too late to bring an action, or to revive this.

Payments on account of interest were made (chiefly in small sums) down to 1895, so that the statutory bar would not accrue till 1907. But Mr. Bourke says that these were payments made out of the lands mortgaged, and not on account of the personal covenant; and as Aglish is sold and the mortgage debt unpaid, the payment of interest cannot keep alive the personal claim.

It is to be remembered that the mortgage of 1858 was merely a sub-mortgage, and John Hurly's executors were the persons to

(1) 45 L. J. Ch. 816.

M. R. 1905.

THOMPSON v. HURLY.

receive interest on the chief mortgage for £5,000, and to pay interest on that of 1858. The only formal letter covering a payment of interest produced is dated April 14, 1882, and is from the executors of John Hurly. I regard this, however, as unimportant. *Sutton* v. *Sutton* (1) and *Fearnside* v. *Flint* (2) have conclusively decided that under section 8 of the Act of 1874 the same period of limitation applies to the remedy upon a mortgage and that upon the covenant to pay: the latter case applying the principle even where the covenant was not contained in the mortgage, but in a collateral bond. Section 8 is as follows:— "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

Sutton v. *Sutton* (1) shows that there is really only one debt, and that the statutory bar is uniform. But Mr. Bourke contended that the payments of interest, though they might prevent the statutory bar so far as the lands were concerned, were inoperative in regard to the covenant to pay. No doubt, a payment of interest by a stranger, as a "voluntary courtesy," will not prevent the statute from running; but is that the case here? *Chinnery* v. *Evans* (3), a case which ruthlessly carried out the logic of the statutes and decisions, determined that payment by the owner of one portion of a mortgaged property prevented the statute from running in favour of the owners of another portion, though the latter had never contributed to any such payment; and that, after

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579. (3) 11 H. L. Cas. 165.

a lapse of near a hundred years—if I remember right—and after a sale to a third person. This proceeds on the plain ground that so long as the creditor receives payment of interest from any person liable to pay, he need not take any steps to enforce payment from any other person or fund, since he is paid, and has no right, and is under no obligation, to sue anyone else.

Now, here the case is stronger, for the person paying was both owner of the property and also the person liable on the covenant. I think, therefore, the claim is not barred by the statute.

But another question remains as to the amount of interest recoverable. I am of opinion that six years is the limit, thus deciding, I think, on the principle of *Sutton* v. *Sutton* (1) and *Fearnside* v. *Flint* (2). The words of the statute are those upon which those cases went. This is a sum of money charged upon land, and section 42 of 3 & 4 Wm. 4, c. 27, limits the recoverable arrear to six years. That section is in these words :—" No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same, respectively, shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." In my opinion, the judgments in *Sutton* v. *Sutton* (1) practically decided this point.

Therefore, I am bound to hold that only six years' interest is recoverable. There must be a declaration that the debt is not barred by the statute, and is recoverable with six years' interest. There will be an order to continue the action, making William Rowan and T. C. Goodman parties.

The following order was made :—

" IT is ordered that the proceedings herein be continued in the name of John Hurly, executor of the late plaintiff, Lucy Thompson, who was executrix of the said testator, as plaintiff, and the applicants,

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579.

M. R.
1905.

THOMPSON
v.
HURLY.

William Rowan and Thomas C. Goodman, as co-defendants with the defendant, John Hurly; and it is further ordered and declared that the said William Rowan and Thomas C. Goodman, the existing trustees of the settlement, dated the 11th day of April, 1836, executed on the marriage of John Collis with Miss M. A. Blennerhassett, in the said notice of motion mentioned, are entitled to the sum of £1390 16*s.* 5*d.* principal, on foot of the mortgage dated the 19th day of May, 1858, made between the said testator, John Hurly, Anna Marion Teresa Hurly, and the Venerable Arthur Blennerhassett Rowan, of the first part, Robert Conway Hurly and the Reverend John Kerin (the two trustees of the said marriage settlement), of the second part, and the Reverend Launcelot Sandes, of the third part, together with the sum of £375 10*s.* (less income tax), interest thereon to the 26th day of January, 1905; and it appearing that the personal estate of the said John Hurly is insufficient to meet any part of the said mortgage debts of £1390 16*s.* 5*d.*, and £375 10*s.* (less income tax) interest, and the costs hereinafter mentioned, it is ordered that the said John Hurly be at liberty to raise, by sale or mortgage of the testator's real estate, a sum not exceeding £2000 and the costs of such mortgage or sale, for the purpose of discharging same; and the Court doth declare that the said William Rowan and Thomas C. Goodman are entitled to their costs of this motion and order, when taxed and ascertained, with their demand, and also the said John Hurly to his costs of this motion and order, as executor's costs, and also his costs, as between solicitor and client, of the mortgage or sale above mentioned, with liberty to any of the parties to apply to the Court as occasion may require; and it is ordered that further proceedings herein be stayed for two months from this date, to enable the above-mentioned money to be raised to pay the said charge and interest."

Solicitors for the applicants: *Huggard & Willington.*
Solicitors for the defendants: *Stanuell & Son.*

W. L.

IN THE MATTER OF THE ESTATE OF THOMAS G. WILLS-SANDFORD.

Meredith, J.
1905.
Mar. 28, 31.
May 5.
July 10.

Land Purchase Acts—Irish Land Act, 1903, *s.* 12 (1)—*Advances and free grants for benefit or improvement of holdings or estates—Sect.* 43—*Fund out of which to be made—Repayment of advances.*

Where an estate is purchased, or proposed to be purchased, under the Irish Land Act, 1903, the Estates Commissioners have jurisdiction, under sect. 12 (1), to make advances or free grants to the purchasing tenants out of the reserve fund mentioned in sect. 43, to enable them to carry out works of improvement on their holdings comprised in the estate, both in the case of sales direct under sections 1 to 5, as well as in the case of sales under sections 6 and 7.

Where such advances are sanctioned they can only, save in cases coming within section 43 (3), be made repayable or recoverable by means of special agreements entered into between the Estates Commissioners and the purchasing tenants, and not by means of purchase annuities.

QUESTIONS referred by the Estates Commissioners to the Judicial Commissioner for his decision under sect. 23 (1) of the Irish Land Act, 1903.

The facts upon which the reference was grounded, together with the questions of law arising thereon, are set out in the judgment.

Matheson, K.C., and *Edmond Coll*, for the Treasury.

MEREDITH, J. :— July 10.

In this case I am called upon to decide important questions of law, referred to me by the Estates Commissioners, under the provisions of sect. 23 (1) of the Irish Land Act, 1903.

The facts upon which the reference is grounded are embodied in the minute of the Estates Commissioners in the following terms:—"The above-mentioned estate has been sold to tenant-purchasers, pursuant to sects. 1–5 of the Irish Land Act, 1903, and advances have been made for the purchase of their holdings

Meredith, J. 1905. *In re* WILLS-SANDFORD'S ESTATE.

to the tenants named in the annexed schedule, the holdings being vested in them accordingly. These tenant-purchasers have applied for advances of the amounts noted opposite their names for carrying out the works of improvement specified in the schedule."

The questions of law arising upon these facts are thus stated for my decision :—" Assuming that the Estates Commissioners are of opinion that the proposed improvements should be executed, and that the amounts proposed to be advanced would be secured on the holdings as improved, the Commissioners desire to refer to the Judicial Commissioner for decision the questions :—(1) Can the Land Commission make all or any of these advances under the Land Purchase Acts, and particularly under sect. 12 (1) of the Irish Land Act, 1903, as being a step for the improvement of the estate ? (2) If such advances can be made, can the tenant-purchasers enter into agreements for the repayment of such advances under section 45 (1) ? (3) If so, are such advances repayable in the manner and at the time prescribed by the Treasury by means of an annuity of £3 5*s.* for every £100 of the advance, and in proportion for any less sum ? (4) If the answers to the preceding questions be in the affirmative, do the Treasury rules, dated 31st December, 1903, apply to the repayment of such advances ? "

Now each and all of the works specified in the schedule annexed to the minute appear to be of a character calculated to benefit the holdings upon which the works are to be executed, and consequently the estate of which each holding forms a part. In every case save one, the proprietors ask for an *advance* of money to be repaid in some shape or form. The solitary exception is a proprietor who asks for a *free grant* to repair his house and improve his land.

The first question is—Under what provision of the Land Purchase Acts can the Estates Commissioners apply public money for all or any of the purposes indicated ? The answer to this question is, in my opinion, free from doubt or difficulty. Sub-sect. (1) of sect. 12 of the Act of 1903 applies with equal force to estates purchased, or proposed to be purchased, by tenants direct from landlords (commonly called direct sales) and estates

purchased, or proposed to be purchased, by the Land Commission. There would be no justification, as the learned counsel for the Treasury expressly admits, for inserting the words "by the Land Commission," or the words "by them," after the words "purchased or proposed to be purchased." The language of the sub-section is free from ambiguity, and applies to cases of direct sales as well as to sales under sects. 6 and 7. The Wills-Sandford Estate is, in my judgment, an estate purchased under the Act of 1903 within the meaning of the sub-section; and that section of the Land Purchase Acts, and that alone, gives the Estates Commissioners power to apply public money for the purposes indicated in the present case. Can it be doubted that the provisions of the sub-section are wide enough to embrace the case of an advance or grant of money by the Estates Commissioners for the purpose of enabling a proprietor to carry out improvement works? The statute speaks for itself: sect. 12 (1) provides that "The Land Commission may take such steps and execute, or cause to be executed, such works as may appear expedient for the benefit or improvement of estates, or untenanted land, purchased or proposed to be purchased under this Act, or for the use or enjoyment thereof, or generally for the purposes of this Act." Words of wider import or fuller significance it is hardly possible to conceive. In the absence of any provision to the contrary (and I can find no such provision), I hold that the Estates Commissioners have clear jurisdiction to take the steps suggested in the present case for the benefit or improvement of the estate, or for the use or enjoyment thereof. The learned counsel for the Treasury doubted whether a free grant of money comes within the intendment of the statute. I have no doubt that it does. Indeed, I might go further and say that it would be strange if such wide words should be held capable of such a narrow interpretation. I have no wish, as I have no power, to say, whether the jurisdiction of making a free grant of money should be exercised in this or any other case; but I have power and authority to say (as I do say) that the jurisdiction exists.

The next question is, assuming that money is required for the benefit or improvement of estates under sect. 12 (1), out of what fund is it to come? I have searched the Land Purchase Acts in

Meredith, J. 1905.

In re WILLS-SANDFORD'S ESTATE.

vain for any fund save that provided by sect. 43 of the Act of 1903. [His Lordship read the section.]

In my judgment, section 43 is the complement of section 12 (1). It, so to speak, finances the earlier section. Mr. Matheson referred to the marginal note: "Provision for expenses of improvements," and, without suggesting that it should be regarded as part of the statute, argued that it was in fact a concise summary of the object, intention, and scope of the section. I agree, subject to this observation, that section 43 is not confined, and of course could not by any marginal note be confined, to "improvement works" alone. The words of the section are "benefit or improvement," and plainly include steps taken for the benefit of the estate as well as, and in addition to, improvement works.

I now come to the third question to be decided, viz., How and in what manner can advances under section 12 be made repayable by, or recoverable from, proprietors of holdings? After much consideration, I have come to the conclusion that the argument addressed to me by Mr. Matheson is correct; and that, save in cases coming within sub-section 3 of section 43, they can only be made repayable or recoverable by means of special agreements entered into between the Estates Commissioners (acting, of course, as the Land Commission) and the proprietors, in the same way as similar advances are made repayable to the Congested Districts Board. I must confess that I regard with anxiety and disfavour this additional burden of a double collection from the same proprietor, which, as the law stands, may be thrown upon the Land Commission. Express legislation in the case of direct sales, though difficult, would not have been impossible. But there is no such legislation, and I must administer the law as it is. The Estates Commissioners ask me to decide whether agreements might be entered into, under the provisions of section 45 (1), for the repayment of these benefit or improvement advances by means of purchase annuities. In my judgment this cannot be done. Section 45 deals with "Purchase Annuities," not benefit or improvement annuities; and comparison of the two sections shows clearly that, in the absence of express legislation, section 45 could not apply to cases like the present, *i.e.* cases of direct sales. The heading prefixed to sections 45 and 46 is "Repayments by Pur-

chasers." The sections deal with purchase annuities, not with benefit or improvement annuities, and the whole object of the section is to regulate and provide for the time, mode, and conditions of repayment by tenants and others of advances made for the purchase of "Holdings" or "Parcels." Section after section of the earlier Land Purchase Acts demonstrate that a "Purchase Annuity" is an annuity payable in respect of an advance for the purchase of land. One illustration may suffice. In the Act of 1891, section 42, the expression "purchase annuity" is defined as follows:—"The expression 'purchase annuity' means an annuity for the repayment of an advance for the purchase of a holding made by the issue of stock under this Act." The Act of 1903, section 27, substitutes cash for stock; but the purchase annuity still remains an annuity for the repayment of an advance for the purchase of land. The cases coming within sub-section 3 of section 43 are cases of purchase annuities in the strictest sense of the word; and, apart from such cases, it would appear to me impossible, in the absence, as I have said, of express legislation, to fit section 43 into section 45.

For these reasons, I answer the first question referred to me by the Estates Commissioners in the affirmative. The question might have been put in another form; but I answer it as it stands, "Yes."

The second question must be answered in the negative; and as the third and fourth questions depend on the assumption that the answer to the second will be in the affirmative, it is unnecessary to answer them.

Solicitor for the Treasury: *Sir Patrick Coll.*

W. C. S.

M. R. 1905. March 12, 14.

In the MATTER of THE VENDOR AND PURCHASER ACT, 1874, and the CONTRACT between DELANY and DEEGAN.

(1904. No. 1071.)

Vendor and purchaser—Requisitions—Threatened litigation—Jurisdiction—Summons.

A purchaser having inquired whether the vendor or her solicitor was aware of any proceedings to set aside a deed on which the title depended, the reply was that no proceedings had been taken or threatened to set aside the deed. It appeared that in a probate action to establish an alleged will of the grantor in the deed (which will purported to dispose of the subject-matter of the contract) the vendor, who was the defendant, on an application for security for costs, made an affidavit alleging that she had evidence showing that the testator was mentally incapable at the date of the will The plaintiff made default in giving security, and the action was stayed. er the contract the plaintiff employed another solicitor, who wrote to the purchaser's solicitor, threatening to impeach the deed on the ground of fraud:—

Held, that the requisitions had been sufficiently answered and a good title shown in accordance with the particulars and conditions of sale. Questions of fraud cannot be entertained on a vendor and purchaser summons.

A chattel interest in the lands of Clonboo, county Tipperary, was bought under conditions of sale; and the requisitions on title were furnished by the purchaser's solicitor. The title to the premises purchased depended on a deed of 27th August, 1902, by which Thomas Bergin, the grantor, conveyed the premises to the vendor.

One of the requisitions was as follows:—"Is the vendor or her solicitor aware of any proceedings being taken or threatened to set aside or impeach the deed of 27th August, 1902? If so, give particulars." The answer to that was as follows:—"No proceedings have been taken or threatened to set aside this deed."

It appeared that one Patrick Bergin, residing in America, had, prior to the sale, instituted a probate action against the vendor to establish a will purporting to be executed by Thomas Bergin,

deceased, the grantor in the deed of 1902, and disposing of the premises of Clonboo. The action was defended by the vendor; and upon an affidavit by her, stating that she had evidence that the alleged will was procured by undue influence at a time when the deceased was mentally incapable, the plaintiff was ordered to give security for costs, and, in default, the action was stayed.

After the sale, and when everything was ready for completion, a solicitor acting for Patrick Bergin wrote to the purchaser's solicitor threatening litigation in reference to the premises of Clonboo, and stating that it was intended to impeach the deed of 1902 on the ground of fraud. No litigation, as a matter of fact, had been commenced in reference to setting aside the deed at the date of the sale.

A summons was issued by the vendor raising the question as to whether the requisitions on title had been sufficiently answered; and by order, dated 13th February, 1905, it was declared that the requisitions had been sufficiently answered by the vendor, and that a good title had been shown in accordance with the particulars and conditions of sale. The order also provided as follows:—"But the Judge, being of opinion that the question would have been more properly decided in a suit for specific performance, doth reserve the question of costs, with liberty to apply," &c.

By motion on notice the purchaser appealed to the Master of the Rolls from the Chamber order made by him, and asked that the same should be reversed, and that in lieu thereof an order of "No rule" be made on the summons, with costs to the purchaser.

Cooper, for the purchaser, contended that this was an attempt of the vendor, by a short cut, to compel the purchaser to accept a title in a case where specific performance would not be ordered.

The Court will not force a title on a purchaser that may involve him in litigation: *Pyrke* v. *Waddingham* (1), *Pegler* v. *White* (2); especially where the premises are claimed by third parties: *Re Harris and Rawlings' Contract* (3).

(1) 10 Hare, 1, 9. (2) 33 Beav. 403. (3) W. N., 1894, 19.

M. R. 1905.

In re DELANY AND DEEGAN'S CONTRACT.

A defect in the title, *aliunde*, has been discovered by the purchaser, which the vendor is unable to remove. Threatened litigation is a grave objection to title, which the purchaser is entitled to insist on. Good title in fact has not been shown. The Court should look at all the circumstances disclosed in the affidavits before answering the bald propositions submitted by the vendor.

Carrigan, for the vendor :—

The Chamber order imposed no obligation on the vendor to bring a suit for specific performance. It did decide that the vendor had sufficiently answered the purchaser's requisitions, and had shown good title in accordance with the conditions of sale. We are content with that decision, and have notified the purchaser to complete the sale. The consequence of his refusal will be to entitle the vendor to declare the deposit money forfeited: *Re National Provincial Bank of England and Marsh* (1); *Re Scott and Alvarez's Contract* (2). The purchaser cannot compel the vendor to sue for specific performance. The purchaser's remedy, if any, is to institute an action for rescission of the contract; and if he does, the vendor will be prepared to defend it.

March 14.

THE MASTER OF THE ROLLS :—

In this proceeding under the Vendor and Purchaser Act, the purchaser having bought under specific conditions of sale, and put in requisitions on title, the vendor issued a summons by which the question which was raised was only whether the requisitions had been sufficiently answered pursuant to the conditions of sale.

On the hearing of the summons, I had no doubt whatever that the requisitions had been sufficiently answered; but it turned out that what the purchaser had at first suspected was a fact, viz.: that some outsider was, or might be, disposed to throw doubt on the title, that is, not upon the title disclosed in the conditions of sale, but on the validity of a certain deed of conveyance which it was said might be impeached. The grantor had made a will, and there

(1) [1895] 1 Ch. 190. (2) [1895] 1 Ch. 596; on appeal—[1895] 2 Ch. 603.

was a suspicious circumstance connected with it that he signed the will as a marksman, while the deed was signed in his own handwriting; and that was a circumstance which, in the opinion of the purchaser, lent some colour to the attack on it. One of the requisitions was: "Is the vendor or her solicitor aware of any proceedings being taken or threatened to set aside or impeach the deed of 27th August, 1902?" and the answer by the vendor's solicitor was that no action had been commenced or threatened, so far as he knew. If that statement were untrue, it would have gone to the root of the matter, and would have upset the whole transaction; but it is not even alleged or suggested that it was untrue. On the contrary, it is conceded that the vendor's solicitor was strictly accurate in his statement according to his belief and in fact, and that no imputation whatever of want of good faith rests upon him. Some time afterwards, when all things were agreed on, and everything was ready for completion, a solicitor for some third party writes that he intends to impeach the deed on the ground of fraud; and this frightened the purchaser. It is natural enough that this result should have occurred, whether he was bound, or not bound, hand and foot by his acceptance of the conditions of sale; because he saw that he might possibly be involved in litigation in reference to the property he had purchased.

There was, however, no litigation commenced in reference to the deed; but litigation had been commenced (prior to the contract) in reference to the will in the Probate branch of the King's Bench Division. In that litigation the present vendor was the defendant, and she applied for security for costs and, in default, the proceedings were stayed, and the action was discontinued. Thus, at the time of the contract, there was no action pending, and the title was one as plain and clear on the conditions of sale as it is possible to have. I had then no option on a vendor and purchaser summons but to say that a good title was shown pursuant to the contract between the parties; but as I knew that there was some sort of cloud on it, owing to the threat of impeachment of the deed, it appeared to me that the question could more properly be tried in a suit for specific performance, and so I reserved the costs of the summons, meaning that if the vendor

M. R. 1905.

In re DELANY AND DEEGAN'S CONTRACT.

chose to sue for specific performance and was defeated, she would have to pay the costs of the summons. That step, however, the vendor did not take; and the question now is, What am I to do on this appeal from my Chamber order? Mr. Cooper suggests that I should make "no rule" on the summons, with costs to the purchaser, by reason of the suggestion made by another person that the deed of 27th August, 1902, is bad. On this summons, however, I have no jurisdiction to try that question—that is, to try a question of fraud on a vendor and purchaser summons. I must take the matter as it stood. In making the order I did in Chamber, I went as far as I could; and I do not think it probable, having regard to the dates and circumstances of the case, that anything more will be heard of the threatened litigation. This is, however, a proceeding in which disputes, such as that suggested here, cannot be determined.

I hold that the purchaser entered into the contract, and that the requisitions have been properly answered. The purchaser has it in his power to complete or not to complete, taking the consequences; and if the consequence of non-completion be that he may forfeit his deposit, I cannot help that.

On this present notice of motion I make no rule. The Chamber order will stand. The purchaser must pay the costs of this application.

Solicitor for the vendor: *John P. Carrigan.*

Solicitor for the purchaser: *A. H. Morgan.*

R. W. L.

NICHOLSON, LANDLORD; EXECUTORS OF SMYTH AND OTHERS, TENANTS.

Appeal.
1905.
Nov. 7.

Landlord and tenant—Ulster Custom—Land Law (Ireland) Act, 1881, *ss.* 21, 57—Bona fide *occupation—Subletting—Compensation.*

APPEAL by the landlord from the judgment of FitzGerald, J., *ante*, p. 288.

Henry, K.C., and *Bird*, for the appellant.

Wylie, K.C., and *Osborne*, for the respondents.

THE COURT OF APPEAL (FitzGibbon, Walker, and Holmes, L.JJ.) affirmed the judgment below, and dismissed the appeal, with costs.

Solicitors for the appellant: *M'Cay & Co.*
Solicitor for the respondents: *J. K. Reid.*

R. D. M.

INDEX.

ABSOLUTE GIFT.—*Will—Property or power—Life estate to wife—After her death executors to sell portion for payment of legacies—Balance to be disposed of according to wishes of wife.*] A testator devised and bequeathed to his wife during her life all his cash, lands, &c., and directed that she was to receive all interest and profits out of his said property, to be paid to her during her life by his executors. After the death of his wife the executors were to sell portion of the property to pay certain pecuniary legacies. Any balance of the property remaining after the said bequests to be disposed of according to the wishes of his wife:—*Held*, that the wife took the property absolutely, subject to the legacies payable after her death. *Reid* v. *Carleton* - - - BARTON, J., 147

—— Restraint on alienation - - - 261
See SETTLEMENT.

ACCRUER OF RIGHT—Legacy—Statute of Limitations - - - 416, 428
See LIMITATIONS, STATUTE OF. 2.

ACKNOWLEDGMENT — Mortgage debt — Payment of interest - - - 588
See LIMITATIONS, STATUTE OF. 3.

ADMINISTRATION ACTION — Claim on covenant in mortgage deed—Amount of interest recoverable - - - 588
See LIMITATIONS, STATUTE OF. 3.

ADMINISTRATOR.
See EXECUTOR.

AFTER-ACQUIRED PROPERTY — Gift from husband to wife—Covenant to settle
See COVENANT TO SETTLE. [272

AGREEMENT FOR PURCHASE — Judicial rent - - - - - 236, 570
See LAND LAW (IRELAND) ACTS. 3.

ALIENATION—Restraint on - - 261
See SETTLEMENT.

AMBIGUITY—*Latent — Description— Name — Surrounding circumstances— Will— Extrinsic evidence.*] A testator gave property on trust for "his grandsons Robert William Henderson and John Barnett Henderson, or the survivor of them, in case they or he shall attain twenty-one years. One of testator's grandsons was named Robert William Henderson, son of Oliver Henderson. Testator

AMBIGUITY—*continued.*
left two other grandsons (the sons of a deceased son) named William Robert Henderson and John Barnett Henderson. *Held*, that extrinsic evidence was admissible to show that William Robert Henderson was the person really intended in the will. *Henderson* v. *Henderson*
[KENNY, J., for M. R. 353

ANNUITY—*Will—Duration—For life or perpetual.*] A testatrix, being entitled to one undivided moiety of the lands of *S.* in the county of Waterford, held under a lease for lives renewable for ever, by her will, dated the 10th January, 1840, devised her interest in the lands of *S.* to trustees, on trust "to permit my nephew, *R. B. O.*, to receive every year the sum of £100 during his natural life, and after his death to the use of his son or sons as may be most deserving, or as he may by will appoint." The power of appointment was never exercised. *R. B. O.* left two sons, who received the annuity during their lives and the life of the survivor. On the death of the survivor:—*Held*, by Ross, J., and the Court of Appeal, that the annuity terminated with the death of the survivor of the two sons of *R. B. O. In re Smith's Estate*; *Whitestone and Harrison*, *Petitioners* - - Ross, J., 453; APP. 459

APPEAL—Land Commission—Judicial Commissioner—Land Law (Ireland) Act, 1903, sect. 24, sub-sect. 12. - - 570
See LAND LAW (IRELAND) ACTS. 3 (*b*).

ARRANGING DEBTOR—*Right to sue—Official assignees—Right to property—Vesting of estate—* Locus standi—*Bankruptcy—Staying proceedings.*] An action to set aside a mortgage transaction affecting property in which the plaintiff claimed an interest was brought by an arranging debtor, and a statement of claim was delivered. By resolution, accepting the proposal in the arrangement matter, it was provided that the plaintiff should pay twenty shillings in the pound on all his unsecured debts and engagements. The payment was to be secured by vesting the plaintiff's estate in the official assignees as trustees, with power, in default of lodgment, to realize the estate. After payment of costs and creditors'

ARRANGING DEBTOR—*continued.*
claims out of the proceeds, the surplus was to be paid to the plaintiff. Default was made in carrying out the arrangement. An order for realization was made, and a vesting certificate issued and registered. The official assignees were not parties to the action, which was commenced after the default and vesting order. After delivery of defence and reply an application was made by one of the defendants to stay the proceedings. The fact of the plaintiff being an arranging debtor was not stated in the pleadings:—*Held*, that the plaintiff had no *locus standi* to carry on the action, and that the proceedings therein should be stayed. *Harrison* v. *Ancketell* - - - M. R. 25

—— Settlement—Limitation until insolvency or alienation - - - - 261
See SETTLEMENT.

ARREARS OF RENT—Sale by mortgagee—Conditions—Land Law (Ireland) Act, 1896, sect. 16 - - - 401
See CONDITIONS OF SALE. 1.

ARTICLES OF SETTLEMENT—Limitations to children - - - - 465
See EXECUTORY SETTLEMENT.

ATTESTATION — Will— Witness beneficiary under secret trust - - - 51
See SECRET TRUST.

BANKRUPTCY—Arranging debtor—Vesting of estate—Staying action - - - 25
See ARRANGING DEBTOR.

—— Limitation in settlement - - - 261
See SETTLEMENT.

BONA FIDE OCCUPATION — Tenancy created for purposes of sale - - 363
See LAND LAW (IRELAND) ACTS. 6.

—— Ulster Tenant right - - - 288, 607
See ULSTER TENANT RIGHT.

BRIDGE — *Navigable and tidal river — Bridge erected under Act of Parliament—Pre-existing ferry —Purchase of—Right to build new bridge without purchase of old one, or without compensation—Bridges (Ireland) Acts*, 1834, 1867, *and* 1875 (4 & 5 *Wm.* 4, *c.* 61; 30 & 31 *Vict. c.* 50; 38 & 39 *Vict. c.* 46).] In 1786 an Act was passed by the Irish Parliament to provide for the erection of a bridge at Waterford over the river Suir, a navigable, tidal river, which divided the counties of Kilkenny and Waterford. The Act authorised certain persons, who were to be formed into a corporation, to raise, by debentures of £50 each, a sum of £30,000; it conferred on them the power of buying up an existing ferry, and of building a bridge, for the use of which they might charge tolls, the produce of which, after repairing, lighting, and watching the bridge, and maintaining any ferry they might establish, was to be divided among the debenture holders. The Act specified certain limits within which the bridge was to be built, and it provided that after the

BRIDGE—*continued.*
bridge was finished the passage over it was to be open and used as a common highway for ever. Remedies were provided for enforcing payment of the tolls, and there was a prohibition, under a penalty, of any person keeping boats to ply for hire within the defined limits. The money was subscribed, the ferry was bought up, the bridge was built and opened for traffic in 1794. In consequence of the growth and increase in traffic, the bridge had become unsuitable for modern requirements. In 1902 the Corporation of Waterford applied by memorial to the Lord Lieutenant, under the Bridges Act, 1834 (4 & 5 Wm. 4, c. 61), and the Acts amending the same, to enable them to erect a new bridge over the river, within the prescribed limits, without offering to purchase the rights of the plaintiffs, the corporation who owned the bridge. A commission was appointed to inquire into, and report on, the matter, and in their report they rejected the site proposed by the defendants, and recommended one close above the plaintiffs' bridge; but they expressed the opinion that a free bridge could be erected without incurring any liability to purchase the plaintiffs' rights in the bridge. In an action brought for a declaration as to the plaintiffs' rights:—*Held* (by the Master of the Rolls and the Court of Appeal), that the defendants were not entitled to erect a new bridge within the prescribed limits without purchasing the plaintiffs' rights, or otherwise compensating them. *Waterford Bridge Commissioners* v. *Corporation of Waterford and The Attorney-General* - - - M. R. 307; APP. 330

CASES—*Bernard* v. *Hungerford* ([1902] 1 I. R. 89) approved of - - - 186, 199
See COVENANT TO RENEW.

—— *Coey* v. *Pascoe* ([1899] 1 I. R. 125) approved of - - - - - 186, 199
See COVENANT TO RENEW.

—— *Colclough's Estate, In re* (8 Ir. Ch. R. 330) distinguished - - - - 460
See LIMITATIONS, STATUTE OF. 4.

—— *Coles* v. *Coles* ([1901] 1 Ch. 711) followed and applied - - - - 272
See COVENANT TO SETTLE.

—— *Doody* v. *Nolan* (2 L. R. Ir. 199) distinguished - - - - - 1
See COVENANT FOR FURTHER ASSURANCE.

—— *Fleetwood, In re* (15 Ch. D. 594) not followed - - - - - 51
See SECRET TRUST.

—— *Goodbody's Estate* (32 Ir. L. T. R. 87) approved of and followed - - - - 363
See LAND LAW (IRELAND) ACTS. 6.

—— *Hone* v. *O'Flahertie* (9 Ir. Ch. R. 497) followed - - - - - 124
See CLOUD ON TITLE.

CASES—*continued.*

—— *Kemmis' Estate, In re* ([1904] 1 I. R. 496, 500), principles of, applied - 207, 371
See LAND LAW (IRELAND) ACTS. 4.

—— *Leader's Estate, In re* ([1904] 1 I. R. 368), principles of, applied - - - 207
See LAND LAW (IRELAND) ACTS. 4.

—— —— —— explained - - - 371
See LAND LAW (IRELAND) ACTS. 4.

—— *Postlethwaite* v. *Lewthwaite* (2 J. & H. 237) explained and distinguished 186, 199
See COVENANT TO RENEW.

—— *Rankin* v. *M'Murtry* (24 L. R. Ir. 290) considered - - - - - - 1
See LIMITATIONS, STATUTE OF. 1.

—— *Stuart* v. *Kennedy* (3 Ir. Jur. O. S. 305) not followed - - - - - 60, 74
See ESTATE FOR LIFE.

—— *Tichborne* v. *Weir* (67 L. T. N. S. 735) followed - - - - - - 1
See LIMITATIONS, STATUTE OF. 1.

—— *Ward* v. *Dyas* (Ll. & G. temp. Sugden 177) followed - - - - - - 252
See RESULTING TRUST.

CLOUD ON TITLE—*Judgment mortgage*—13 & 14 *Vict. c.* 29, *s.* 6.] The Court has jurisdiction to make a declaration that a judgment registered as a mortgage against lands, in which the judgment debtor has no interest, does not affect those lands. *Hone* v. *O'Flahertie* (9 Ir. Ch. R. 497) followed. *Heeney* v. *White* - - - - M. R. 124

COMPANY— Debentures — Interest — Security for overdraft—Proof—Winding up 112
See INTEREST ON MONEY.

—— Directors — Liability for costs occasioned by misfeasance not involving monetary loss - - - - - - - 133
See DIRECTORS.

COMPENSATION—Ulster tenant right custom
See ULSTER TENANT RIGHT. [288, 607

CONDITION IN WILL—*Condition in restraint of marriage—Contingent gift—Intermediate income.*] A testator bequeathed a farm to his wife for life, and upon her death to his nephew *W.*, provided he married *M. F.*, but not otherwise, and appointed his wife residuary legatee. After the death of the widow *M. F.* refused to marry *W.* The personal representative of the widow claimed the farm under the residuary gift in the will:—*Held* (1), that marriage with *M. F.* was a condition precedent to *W.* taking the farm; (2), that *W.*, upon performing the condition, was entitled to the farm as from the death of the widow, and that it did not fall into the residue meanwhile, but that the rents and profits should be accumulated from her death until the condition was performed, or performance became impossible by the death of one of the parties. *Kiersey* v. *Flahavan* M. R. 45

CONDITIONAL ORDER—Sale — Statute of Limitations - - - - - 460
See LIMITATIONS, STATUTE OF. 4.

CONDITIONS OF SALE—*Arrears of rent—Sale of tenancy by mortgagee in possession—Rent legally due and owing—Payment of two years' arrears under sect.* 16 *of Land Act of* 1896 (59 & 60 *Vict. c.* 47)—*Landlord's right to arrears of rent.*] *H. S.*, in 1893, mortgaged a farm, of which he was tenant from year to year, to *W.*, to secure £400. In May, 1899, *W.* died, having by his will appointed *D.* and *G.* his executors. The rent fell into arrear, and on the 8th December, 1900, the landlord recovered judgment for £500, which he registered as a mortgage against the lands of *S.* In October, 1900, the landlord obtained a decree in ejectment against *S.* for five years' arrears of rent, to May, 1901, amounting to £480. Caretakers' notices were served on the 30th November, 1901, claiming £162, being two years' rent. The solicitors for the executors paid to the landlord the sum of £162, and having brought ejectment proceedings against *S.*, recovered possession of the farm on the 1st August, 1902. On the 27th May, 1903, the executors put up the farm for sale, under conditions of sale, the 5th of which stated that all rent legally due and owing by the vendors as mortgagees of *S.* would be cleared in respect of the premises up to the 1st November, 1902. *T.* was declared purchaser at £880, and by his requisitions the purchaser required the vendors to produce the receipt for the rent up to the 1st November, 1902. The vendors, relying on sect. 16 of the Land Act, 1896, declined to pay all the arrears, but undertook to pay all rent due since the date of the ejectment proceedings by the landlord. The landlord's agent informed the purchaser on the 19th of June, 1903, that he would not accept a new tenant of the farm while any of the arrears of rent were unpaid:—*Held* (affirming the decision of Kenny, J.), that the balance of three years' arrears of rent remained a debt due to the landlord, who could refuse his assent to the sale, and that until his claim was satisfied the purchaser could not be forced to complete the sale. *In re O'Donnell and Todd's Contract* - - - - - APP. 401

2. —— *Misleading condition — Condition not to inquire into prior title—Lease of recent date taken as root of title—Defect in prior title within knowledge of vendor.*] By lease, dated the 18th March, 1865, *C.* demised to *F.* a farm in the county of Cork for twenty-one years. The lease contained a covenant against alienation without the consent in writing of the landlord, except a disposition of the whole to one person by will. By his will, dated the 21st September, 1873, *F.* bequeathed his farm to his executors, one of whom was his wife, on trust for his daughter, subject to payment of £500 for his

CONDITIONS OF SALE—*continued.*
wife. *F.* died shortly after. In February, 1875, *D. A.* married Miss *F.*, when two deeds were executed, both dated the 3rd February, 1875. By the first of these the executors of *F.* and Miss *F.* assigned the farm to *D. A.* in consideration of £500 paid to Mrs. *F.*, and by the other deed *D. A.* assigned the farm to trustees upon trust for *D. A.* for life, with various other trusts. The settlement was lost, and the consent of the landlord in writing had not been obtained to either assignment. By agreement, dated the 12th January, 1894, a judicial tenancy was declared of the farm from *C.* to *D. A.*, and on the 30th July, 1901, *C.* granted a new lease to *D. A.* for twenty-one years, from January, 1901. In February, 1904, *D. A.* put up the farm for sale by auction, and in the particulars it was described as held under lease for twenty-one years, from January, 1901. The eleventh condition of sale provided that the title was to commence with the lease of 31st July, 1901, and the purchaser was precluded from making any inquiry into or investigation of the vendor's title prior to the lease, and it was also stipulated that the purchaser should assume that the lessor had full power to grant same. *T.* was declared the purchaser, and on the search in the Registry of Deeds, the marriage settlement of the 3rd February, 1875, was discovered, and *T.* refused to complete the purchase:—*Held*, by FitzGibbon and Walker, L.JJ. (*diss.* Holmes, L.J.), affirming the decision of the Master of the Rolls, that the eleventh condition of sale was misleading and unfair; that the title was defective; and that the purchaser should not be compelled to complete. *Held*, by Holmes, L.J., that the assignment and settlement of the 3rd February, 1875, were both void, as being made in violation of the covenant against alienation; and that the trusts of such settlement did not attach to the tenancy of *D. A.* that came into existence after the expiration of the term of the lease of 1865. *In re Turpin and Ahern's Contract*
[M. R. 85; App. 98

3. —— *Stating defect of title—Will—Bequest to wife in trust—Delegation of trust.*] A condition of sale of leasehold premises stated that a testator, by his will, bequeathed the premises to his wife, in trust for herself and her children, to be applied by her as she should deem most expedient, and that, to give effect to the trusts contained in the will, the widow, on her re-marriage, conveyed the premises to trustees, upon trust, by sale or mortgage, to raise £1000 for the benefit of the said children, and that, in pursuance of this trust for sale, the vendors were selling and would convey the premises as trustees, and not otherwise, and should not be bound to procure the concurrence of any other parties. The will contained no provision authorising this to be done. The purchaser

CONDITIONS OF SALE—*continued.*
refused to complete, on the ground that a good title had not been shown, as the widow had no power to delegate her trust. The vendors relied on the condition:—*Held*, that the widow committed a breach of trust by assigning the premises to trustees, and that the purchaser was not precluded by the condition from objecting to the title on this ground, inasmuch as he was entitled to assume that a power to do what was done by the widow would be shown. *In re O'Flanagan and Ryan's Contract* - - - - M. R. 280

—— Requisitions—Sufficiency of answer 602
See Requisitions on Title.

CONTINGENT GIFT—Will—Intermediate income - - - - - - 45
See Condition in Will.

COSTS—Litigation caused by misfeasance of directors not involving monetary loss 133
See Directors.

COVENANT FOR FURTHER ASSURANCE—*Lease subject to 7 Geo. 4, c. 29, s. 3—Assignment by settlement—Covenant whether void.*] A covenant for further assurance by a settlor in a marriage settlement, by which a lease is assigned without the consent of the lessor (contrary to the statute 7 Geo. 4, c. 29, s. 3), is not void, although the assignment of the lease is void, and can be enforced against the settlor if he becomes a "present tenant" of the lands, and so gets rid of the restraint upon alienation imposed by the statute; and an agreement by him to assign the lands to another person though for value, will not prevail against the beneficiaries under the settlement. *Doody* v. *Nolan* (2 L. R. Ir. 199) distinguished. *O'Connor* v. *Foley* - - M.R. 1

COVENANT TO RENEW—*Ecclesiastical lease—Sub-lease*—Toties quoties *covenant—Purchase of fee by sub-lessor—Obligation to renew—Irish Church Act*, 1869 (32 & 33 *Vict. c.* 42, *ss.* 12, 34.] A cathedral corporation leased a plot of ground, part of their fee-simple property, for forty-one years, without any right of renewal, to a lessee, whose trustees, in whom the lease became vested, executed a sub-lease of the premises with a *toties quoties* covenant for renewal. The defendants, who were assignees in trust of the lessee, purchased the fee-simple from the Commissioners of Church Temporalities, under section 34 of the Irish Church Act, and obtained a conveyance, dated 7th August, 1879. On the expiration of the sub-lease in 1900, the sub-lessee called on the defendants to make to him a grant in perpetuity in pursuance of the covenant to renew, which they declined to do:—*Held*, by the Court of Appeal (affirming the judgment of Barton, J.), that the sub-lessee was not entitled to relief. *Bernard* v. *Hungerford* ([1902] 1 I.R. 89) and *Coey* v. *Pascoe* ([1899] 1 I. R. 125) approved

COVENANT TO RENEW—*continued.*
of. *Postlethwaite* v. *Lewthwaite* (2 J. & H. 237) explained and distinguished. *M'Sweeney* v. *Drapes* [BARTON, J. 186; APP. 199

COVENANT TO SETTLE—*Marriage settlement—After-acquired property—Gift from husband to wife.*] By a marriage settlement, dated the 9th November, 1883, it was agreed that if the intended wife then was, or if, during the intended coverture, she or her intended husband in her right should, at one time and from one source, become entitled to property of the value of £100 or upwards, except jewels, &c., the intended husband and wife would do all things necessary for vesting the same in the trustees of the settlement, upon the trusts thereby declared of certain property of the intended wife. In 1903, the husband, for a nominal consideration, transferred certain shares, exceeding £100 in value, in a limited company to his wife: —*Held*, that these shares were not bound by the settlement. *Coles* v. *Coles* ([1901] 1 Ch. 711) followed and applied. *Kingan* v. *Matier* [BARTON, J., 272

DEBENTURES—Security for overdraft—Interest—Winding up—Proof - - 112
See INTEREST ON MONEY.

DELEGATION—Of trust—Invalidity - 280
See CONDITIONS OF SALE. 3.

DEROGATION—From grant—Obstruction of doorway - - - - - 154, 174
See WAY.

DESCRIPTION—Legatee—Name—Latent ambiguity - - - - - 353
See AMBIGUITY.

DIRECTORS—*Companies Act*, 1862, *sect.* 165—*Liability of Directors for costs of litigation occasioned by misfeasance not causing monetary loss.*] *J.*, *M.*, and *I.* were Directors of a Joint Stock Company which was being wound up voluntarily. In the course of the liquidation it appeared that cheques signed by *J.* and *M.* had been drawn against the Bank account of the Company for purposes in which *I.* alone was interested: but that, on the whole account, lodgments had been made by *I.* to the credit of the Company to an amount larger than the sums drawn out upon the cheques so signed by *J.* and *M.* On a summons by the Liquidator, under sect. 165 of the Companies Act, 1862, to determine whether these sums had been expended *ultra vires*, and in breach of trust, and, if so, that the Directors should repay the said sums, it was found that no money loss had been sustained by the Company, but the Court decided that the Directors were guilty of gross neglect and breach of duty, and that such neglect and breach of duty were the cause of the litigation, and ordered that the Directors should pay the costs of the summons and inquiry:—*Held*, that the Court had jurisdiction to make the order that the Directors should pay the costs, although

DIRECTORS—*continued.*
the claim of the Liquidator for repayment of money had failed. *In re David Ireland & Co.* APP. 183

DISMISSAL—Petition for sale—Practice, Land Judge - - - - - - 413
See TENANT FOR LIFE AND REMAINDERMAN.

DOOR—Way necessary for convenient user of demised premises—Key given to lessee at date of lease - - - 154, 174
See WAY.

EASEMENT—Way necessary for convenient enjoyment of tenement - 154, 174
See WAY.

ECCLESIASTICAL LEASE—Acquisition of fee by lessee—Effect on sub-lease with *toties quoties* covenant - 186, 199
See COVENANT TO RENEW.

ENTRY—Right of—Judicial tenant—Fishery reserved—Rights incidental thereto 434
See FISHERY. 2.

ESTATE FOR LIFE—*Settlement—Construction—Lost deed—Evidence of contents—Memorial—Estate* pur autre vie *– Grant to trustees in trust for* A *and his heirs for life, and after his death to the use of the first and every other son of* A *and his intended wife, and in default of such issue to the issue female of the marriage—Power to appoint by will—Deed executed by donee of the power inconsistent with exercise of power—Release of power.*] By marriage settlement, dated the 1st May, 1806, made on the marriage of *T. L.* and *A. D.*, lands held under a lease for lives renewable for ever were conveyed by *J. L.* (the father of *T. L.*) to trustees and their heirs, on trust to permit *T. L.*, his heirs, and assigns, to occupy and enjoy the lands during his life, and after his death to the use of the first, second, and all and every other the sons of the said *T. L.* lawfully begotten, and in default of such issue, then to the issue female of the marriage. The settlement of the 1st May, 1806, was lost, and the only evidence of its contents was taken from a memorial from the Registry of Deeds. The lease for lives renewable for ever was converted into a fee-farm grant in 1856. By his will, dated the 4th June, 1858, *T. L.* devised one portion of the lands to his son *W. L.* and to the heirs of his body, and the remaining portion to him for life, with remainder in each case as he should by will appoint. By his will, dated the 13th February, 1883, *W. L.* appointed all the lands to *T. W. L.* and *H. C. L.* in fee; and by indenture, dated the 11th November, 1884 (executed on the marriage of his niece, *A. L.*), *W. L.* granted the same lands to trustees, in trust, subject to limitations which determined for *A. L.* in fee. *A. L.* died in 1886; *W. L.* died in 1902:—*Held*, by the Master of the Rolls—(1) on the construction of the settlement of the 1st May, 1806, that *T. L.* took an estate for

ESTATE FOR LIFE—*continued.*
life, with an ultimate limitation in fee, and that, the estates of the sons and daughters being life estates only, the title should be traced through *T. L.*; (2) that the power of appointment, though exercisable by will only, could be released; and that the deed of the 11th November, 1884, operated as a release of the power, and that the plaintiff was entitled to the lands as heiress of *A. L.* or of *T. L. Stuart* v. *Kennedy* (3 Ir. Jur., O. S., 305) not followed. *Held*, by the Lord Chancellor and Holmes, L.J., that under the settlement of the 1st May, 1806, the sons and daughters took life estates only, and that there was an ultimate remainder to *T. L.* in fee. *Held*, by FitzGibbon and Walker, L.JJ., that the sons and daughters took life estates, with a resulting trust to the settlor, *J. L.*, and that on the death of *J. L.*, in 1829, intestate, *T. L.*, as his heir, became entitled. *Held*, also, by the Court of Appeal, that the deed of the 11th November, 1884, being inconsistent with the exercise of the power of appointing by will, operated as a release of the power, and that the plaintiff was entitled to the lands. *Chism* v. *Lipsett* - - - - - - M. R. 60, 74

——Limitation until insolvency or alienation 261
See SETTLEMENT.

—— Practice, Land Judge—Dismissal of petition—Opposition by remainderman - 413
See TENANT FOR LIFE AND REMAINDERMAN.

—— Property or power - - - - 147
See ABSOLUTE GIFT.

—— Rentcharge whether for life or perpetual 453, [459
See ANNUITY.

ESTATE IN FEE—Remainder - - 60, 74
See ESTATE FOR LIFE.

—— Remainder—Limitation until insolvency of alienation - - - - 261
See SETTLEMENT.

ESTATE PUR AUTRE VIE—Settlement—*Cestui que trust* whether taking in fee or for life only - - - - 60, 74
See ESTATE FOR LIFE.

ESTATES COMMISSIONERS—Jurisdiction—Price - - - - - 448
See LAND LAW (IRELAND) ACTS.

EVIDENCE—Easement necessary for convenient use of demised premises - 154, 174
See WAY.

—— Extrinsic—Latent ambiguity—Will 353
See AMBIGUITY.

—— Lost deed—Memorial - - - 60, 74
See ESTATE FOR LIFE.

EXCLUSIVE RIGHT OF FISHING.
See FISHERY.

EXECUTOR—*Implied power of sale—Real estate—Intention of testator — Will — Construction.*] After bequeathing a pecuniary legacy, and directing its investment, a testator provided as follows:—"I will and bequeath all the remainder of my property in lands, . . . together with chattels, stock, shares, furniture, and personal effects, to my brothers and sisters, or their representatives, in equal shares." Testator, after naming the beneficiaries and indicating their shares, appointed two persons who were not beneficiaries under his will "to be my executors, to carry out the intention of this my last will and testament":—*Held*, that the executors were given by the will an implied power of sale over the real estate. *Carlisle* v. *Cooke.*
[M. R. 269

2. —— *Mortgage by administrator—Payment of debts and to one of the next-of-kin—Mortgage in due course of administration.*] By mortgage, dated the 10th February, 1876, *D. O.* mortgaged the lands for sale in the matter to *G. L.*, to secure the sum of £350. *G. L.* died on the 11th August, 1878, intestate and unmarried, leaving him surviving six brothers and one sister, his only next-of-kin. On the 23rd September, 1878, letters of administration to his estate were granted to *J. L.*, a brother of the deceased. On the 20th December, 1886, *J. L.* executed a sub-mortgage of the mortgage of the 10th February, 1876, to *H.*, to secure the repayment of £200. At the time the sub-mortgage was executed *J. L.* stated to *H.* that he required the money partly for the purpose of paying the debts of *G. L.*, and also to pay one of the next-of-kin who was going abroad:—*Held* (affirming the decision of Ross, J.), that the mortgage was made in the ordinary course of administration, and was a valid mortgage. *In re O'Donnell's Estate.*
[Ross, J., 406; APP. 409

EXECUTORY SETTLEMENT — *Marriage articles—Covenant to convey real estate to use of children of marriage as tenants in common and their respective heirs and assigns—Death of son under twenty-one—Survivorship to other children.*] By an indenture made in consideration of his intended marriage with *B.*, *W.* covenanted with a trustee that he would convey and settle certain real estate to the use of himself for life, with remainder to the use that *B.* should receive a jointure, with remainder to the use of the children of *W.* and *B.* in equal shares as tenants in common and their respective heirs and assigns. A son of the marriage died in the lifetime of *W.*, under age, and without having married:—*Held*, that the other children, all of whom had attained twenty-one, became entitled to the entire estate, subject to the life interest and jointure. *Herring-Cooper* v. *Herring-Cooper* - - - - BARTON, J., 465

EXTRINSIC EVIDENCE — Will — Latent ambiguity - - - - - 353
See AMBIGUITY.

FAIR RENT—Declaration fixing 236, 570
See LAND LAW (IRELAND) ACTS. 3.

FERRY—Toll-bridge—Interference with
See BRIDGE. [307, 330

FICTITIOUS TENANT—Sale—Agreement
See LAND LAW (IRELAND) ACTS. 6. [363

FISHERY — *Landlord and tenant — Sporting rights—Exclusive right of fishing—Judicial tenant —Interference with right—Injunction.*] A judicial tenant will be restrained from erecting, or keeping erected, an obstruction to the reasonable exercise of the exclusive right of fishing reserved to the landlord, under the Land Law (Ireland) Act, 1881, sect. 5, which is not the necessary result of the *bona fide* and reasonable exercise by such tenant of his right, as tenant of the lands, in the proper cultivation and management thereof. So, where a judicial tenant erected a barbed wire paling on his holding, along a salmon and trout river, opposite a salmon pool, in such a position as to prevent all reasonable exercise of the exclusive right of fishing, reserved as aforesaid, by a grantee of such right, the Court granted an injunction, being of opinion, on the evidence, that the barbed wire paling was not erected in the *bona fide* and reasonable exercise of the tenant's rights, as stated above. *Boyle* v. *Holcroft*. - - - - BARTON, J., 245

2. —— *Landlord and tenant—Sporting rights—Exclusive right of fishing—Judicial tenant—Landlord's right of entry—Right incidental thereto—Injunction.*] A landlord entitled to the exclusive right of fishing, and to a right of entry for that purpose, under section 5 of the Land Law (Ireland) Act, 1881, in a portion of a river adjoining a judicial tenant's holding, the bank and bed of which, *ad medium filum aquæ*, form part of the holding, has, as incidental thereto, the right of doing all things necessary for the use of his right of fishing and entry; but he cannot claim anything in the nature of an enlargement or extension of such right. Where a landlord entitled to the exclusive right of fishing in a river forming part of the holding of a judicial tenant, as above mentioned, claimed a right to enter upon the lands of such tenant for the purpose of—(1) piling and embanking part of the bank of the river, and making a path for fishermen on the embankment; (2) placing stones and rocks in the bed of the river for shelter for salmon; (3) cutting and keeping down weeds in the bed of the river:—*Held*, that the landlord's claim failed as to (1) and (2). *Held*, also, as to (3), that the landlord, under the circumstances of the present case, had a right of entry for the purpose of cutting and keeping down useless and injurious weeds. *Caldwell* v. *Kilkelly*
[BARTON, J., 434

FORESHORE—Patent—Manor—Acts of ownership - - - - 483, 509
See SEASHORE.

FORFEITURE—On insolvency or alienation—Settlement - - - - 261
See SETTLEMENT.

FRAUD—Unfair transaction—Setting aside 1
See UNDUE INFLUENCE.

GIFT—From husband to wife—Settlement 272
See COVENANT TO SETTLE.

GIFT OVER — On insolvency or alienation — Settlement - - - - 261
See SETTLEMENT.

GRAFT—Ecclesiastical lease—Purchase of fee by lessee — *Toties quoties* covenant in sub-lease - - - - 186, 199
See COVENANT TO RENEW.

HOLDING—Advance or grant for improvements —Irish Land Act, 1903, s. 12 (1) s. 43—Repayment of advances - - 597
See LAND LAW (IRELAND) ACTS. 1.

HUSBAND AND WIFE—Gift between—Covenant to settle - - - - 272
See COVENANT TO SETTLE.

—— Settlement.
See SETTLEMENT.

IMPROVEMENTS — Holding or estate — Advances for—How repayable—Irish Land Act, 1903, ss. 12 (1), 43 - - 597
See LAND LAW (IRELAND) ACTS. 1.

INJUNCTION — Judicial tenant — Interference with reserved sporting rights - 245
See FISHERY. 1.

—— Judicial tenant — Reservation of fishing — Rights incidental thereto - - 434
See FISHERY. 2.

—— Toll-bridge—Erection of free bridge without compensation - - - - 307, 330
See BRIDGE.

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—— Administration action — Covenant in mortgage—Amount recoverable - 588
See LIMITATIONS, STATUTE OF. 3.

INTERMEDIATE INCOME — Conditions in restraint of marriage—Will - 45
See CONDITION IN WILL.

INTOXICATING LIQUORS—Sale of—Judicial tenancy - - - - - 472
See LAND LAW (IRELAND) ACTS. 5.
INVESTMENT—Trust funds—Purchase-money of land—Public Trustee - 532, 546
See PUBLIC TRUSTEE.
JUDGMENT MORTGAGE — Registered against lands not the property of the judgment debtor - - - - 124
See CLOUD ON TITLE.
JUDICIAL RENT—Purchase agreement 236,
See LAND LAW (IRELAND) ACTS. 3 [570
—— Tenant—Interference with reserved sporting right - - - - - - 245
See FISHERY. 1.
—— Tenant—License—Public house—Breach of statutory condition - - - 472
See LAND LAW (IRELAND) ACTS. 5.
—— Tenant—Right of fishing reserved — Rights incidental thereto - - - 434
See FISHERY. 2.
JURISDICTION — Appeal — Judicial Commissioner - - - - - - 570
See LAND LAW (IRELAND) ACTS. 3 (*b*).
—— Chancery Division—Removal of cloud on title—Judgment mortgage - - 124
See CLOUD ON TITLE.
—— Estates Commissioners—Sale—Price 448
See LAND LAW (IRELAND) ACTS. 2.
—— Summons — Vendor and purchaser — Fraud
See REQUISITIONS ON TITLE. [602

LAND LAW (IRELAND) ACTS — *Advances and free grants for benefit or improvement of holdings or estates—Irish Land Act*, 1903, *s.* 12 (1)—*Sect.* 43—*Fund out of which to be made—Repayment of advances.*] Where an estate is purchased, or proposed to be purchased, under the Irish Land Act, 1903, the Estates Commissioners have jurisdiction, under sect. 12 (1), to make advances or free grants to the purchasing tenants out of the reserve fund mentioned in sect. 43, to enable them to carry out works of improvement on their holdings comprised in the estate, both in the case of sales direct under sections 1 to 5, as well as in the case of sales under sections 6 and 7. Where such advances are sanctioned they can only, save in cases coming within section 43 (3), be made repayable or recoverable by means of special agreements entered into between the Estates Commissioners and the purchasing tenants, and not by means of purchase annuities. *In re Wills-Sandford's Estate* MEREDITH, J., 597

2. —— *Jurisdiction of the Estates Commissioners—Equity of the price agreed upon—Irish Land Act*, 1903, *s.* 5 (1).] Where an agreement for purchase has been entered into between a landlord and a tenant, and the Commissioners are satisfied with the security for the amount of the advance applied for, the Estates Commissioners have no jurisdiction in the absence of duress, fraud, unfair dealing, compulsion, or other ground on which a Court of Equity would stay proceedings or refuse to carry out the contract, to interfere between the landlord and the tenant on the ground that the agreed price might, in the view of the Commissioners, be too high or too low. *In re King-Harman's Estate; Hayes, Purchaser* - - MEREDITH, J., 448

3. (*a*) —— *Purchase agreement—Construction of term "judicial rent" in section* 1 *of the Irish Land Act*, 1903.] Upon the same day *A*, the agent for the vendor, accepted service of an originating notice by a non-judicial tenant to fix a judicial rent, a consent was entered into fixing such rent, and an agreement for purchase was signed:—*Held*, that the case did not come within section 1, sub-section (1), of the Irish Land Act, 1903. *In re Talbot Crosbie's Estate; Duggan, Tenant*

[MEREDITH, J., 236

3. (*b*) —— *Purchase agreement—Land Act*, 1903, *sections* 1, 24—"*Holding subject to a judicial rent fixed or agreed to since the passing of the Act of* 1896"—*Purchase agreement—Date of—Date of application for advance—Appeal — Jurisdiction.*] *W.*, a first term judicial tenant, entered into an originating agreement with the vendor, pursuant to sect. 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, fixing the rent of the holding for the second term. This agreement and declaration were lodged in the Land Commission on the 30th March, 1904, and were filed on the 30th June following. The percentage reduction in the rent would bring the case within the zone limits in sect. 1 of the Land Act of 1903. On the 30th April, 1904, *W.* and the vendor signed a purchase-agreement, under the Irish Land Act, 1903, for the purchase of the holding, which was lodged in the Irish Land Commission on the 26th July, 1904:—*Held*, that sect. 24, sub-sect. 12, of the Irish Land Act, 1903, does not take away the general right of appeal from an order of the Judicial Commissioner to the Court of Appeal. *Held* (2), reversing the decision of Meredith, J., that the date on which the application was lodged with the Land Commission, and not the date of the purchase agreement, was the date on which an "application was made for an advance" within the meaning of sect. 1, sub-sect. 1, of the Act of 1903; that the date of lodging the application was the date for determining whether the holding was "subject to a judicial rent fixed or agreed to since the passing of the Act of 1896," as mentioned in sect. 1, sub-sect. 1 (*a*), of the Act of 1903; and that the case was one in which the Estates Commissioners were bound to sanction the advance applied for. *In re Talbot Crosbie's Estate; Walsh, Tenant*

[MEREDITH, J., 236; APP. 570

4. —— *Redemption of superior interests—Date at which value is to be ascertained—Variable rent—*

FAIR RENT—Declaration fixing 236, 570
See LAND LAW (IRELAND) ACTS. 3.
FERRY—Toll-bridge—Interference with
See BRIDGE. [307, 330
FICTITIOUS TENANT—Sale—Agreement
See LAND LAW (IRELAND) ACTS. 6. [363
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[BARTON, J., 434
FORESHORE—Patent—Manor—Acts of ownership - - - - 483, 509
See SEASHORE.
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See SETTLEMENT.
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See LAND LAW (IRELAND) ACTS. 1.
HUSBAND AND WIFE—Gift between—Covenant to settle - - - - 272
See COVENANT TO SETTLE.
—— Settlement.
See SETTLEMENT.
IMPROVEMENTS — Holding or estate — Advances for—How repayable—Irish Land Act, 1903, ss. 12 (1), 43 - - 597
See LAND LAW (IRELAND) ACTS. 1.
INJUNCTION — Judicial tenant — Interference with reserved sporting rights - 245
See FISHERY. 1.
—— Judicial tenant — Reservation of fishing — Rights incidental thereto - - 434
See FISHERY. 2.
—— Toll-bridge—Erection of free bridge without compensation - - - . 307, 330
See BRIDGE.
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—— Administration action — Covenant in mortgage—Amount recoverable - 588
See LIMITATIONS, STATUTE OF. 3.
INTERMEDIATE INCOME — Conditions in restraint of marriage—Will - 45
See CONDITION IN WILL.

INTOXICATING LIQUORS—Sale of—Judicial tenancy - - - - - 472
See LAND LAW (IRELAND) ACTS. 5.
INVESTMENT—Trust funds—Purchase-money of land—Public Trustee - 532, 546
See PUBLIC TRUSTEE.
JUDGMENT MORTGAGE — Registered against lands not the property of the judgment debtor - - - - 124
See CLOUD ON TITLE.
JUDICIAL RENT—Purchase agreement 236, [570
See LAND LAW (IRELAND) ACTS. 3
—— Tenant—Interference with reserved sporting right - - - - - - 245
See FISHERY. 1.
—— Tenant—License—Public house—Breach of statutory condition - - - 472
See LAND LAW (IRELAND) ACTS. 5.
—— Tenant—Right of fishing reserved — Rights incidental thereto - - - 434
See FISHERY. 2.
JURISDICTION — Appeal — Judicial Commissioner - - - - - - 570
See LAND LAW (IRELAND) ACTS. 3 (*b*).
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See CLOUD ON TITLE.
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See LAND LAW (IRELAND) ACTS. 2.
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See REQUISITIONS ON TITLE. [602

LAND LAW (IRELAND) ACTS — *Advances and free grants for benefit or improvement of holdings or estates—Irish Land Act*, 1903, *s.* 12 (1)—*Sect.* 43—*Fund out of which to be made—Repayment of advances.*] Where an estate is purchased, or proposed to be purchased, under the Irish Land Act, 1903, the Estates Commissioners have jurisdiction, under sect. 12 (1), to make advances or free grants to the purchasing tenants out of the reserve fund mentioned in sect. 43, to enable them to carry out works of improvement on their holdings comprised in the estate, both in the case of sales direct under sections 1 to 5, as well as in the case of sales under sections 6 and 7. Where such advances are sanctioned they can only, save in cases coming within section 43 (3), be made repayable or recoverable by means of special agreements entered into between the Estates Commissioners and the purchasing tenants, and not by means of purchase annuities. *In re Wills-Sandford's Estate* MEREDITH, J., 597

2. —— *Jurisdiction of the Estates Commissioners—Equity of the price agreed upon—Irish Land Act*, 1903, *s.* 5 (1).] Where an agreement for purchase has been entered into between a landlord and a tenant, and the Commissioners are satisfied with the security for the amount of the advance applied for, the Estates Commissioners have no jurisdiction in the absence of duress, fraud, unfair dealing, compulsion, or other ground on which a Court of Equity would stay proceedings or refuse to carry out the contract, to interfere between the landlord and the tenant on the ground that the agreed price might, in the view of the Commissioners, be too high or too low. *In re King-Harman's Estate; Hayes, Purchaser* - - MEREDITH, J., 448

LAND LAW (IRELAND) ACTS—*continued.*

3. (*a*) —— *Purchase agreement—Construction of term "judicial rent" in section* 1 *of the Irish Land Act*, 1903.] Upon the same day *A*, the agent for the vendor, accepted service of an originating notice by a non-judicial tenant to fix a judicial rent, a consent was entered into fixing such rent, and an agreement for purchase was signed:—*Held*, that the case did not come within section 1, sub-section (1), of the Irish Land Act, 1903. *In re Talbot Crosbie's Estate; Duggan, Tenant*

[MEREDITH, J., 236

3. (*b*) —— *Purchase agreement—Land Act*, 1903, *sections* 1, 24—"*Holding subject to a judicial rent fixed or agreed to since the passing of the Act of* 1896"—*Purchase agreement—Date of—Date of application for advance—Appeal — Jurisdiction.*] *W.*, a first term judicial tenant, entered into an originating agreement with the vendor, pursuant to sect. 8, sub-sect. 6, of the Land Law (Ireland) Act, 1881, fixing the rent of the holding for the second term. This agreement and declaration were lodged in the Land Commission on the 30th March, 1904, and were filed on the 30th June following. The percentage reduction in the rent would bring the case within the zone limits in sect. 1 of the Land Act of 1903. On the 30th April, 1904, *W.* and the vendor signed a purchase-agreement, under the Irish Land Act, 1903, for the purchase of the holding, which was lodged in the Irish Land Commission on the 26th July, 1904:—*Held*, that sect. 24, sub-sect. 12, of the Irish Land Act, 1903, does not take away the general right of appeal from an order of the Judicial Commissioner to the Court of Appeal. *Held* (2), reversing the decision of Meredith, J., that the date on which the application was lodged with the Land Commission, and not the date of the purchase agreement, was the date on which an "application was made for an advance" within the meaning of sect. 1, sub-sect. 1, of the Act of 1903; that the date of lodging the application was the date for determining whether the holding was "subject to a judicial rent fixed or agreed to since the passing of the Act of 1896," as mentioned in sect. 1, sub-sect. 1 (*a*), of the Act of 1903; and that the case was one in which the Estates Commissioners were bound to sanction the advance applied for. *In re Talbot Crosbie's Estate; Walsh, Tenant*

[MEREDITH, J., 236; APP. 570

4. —— *Redemption of superior interests—Date at which value is to be ascertained—Variable rent—*

LAND LAW (IRELAND) ACTS—*continued.*
Circumstances to be considered.] *C.* sold to his tenants his estate, which was held under a perpetuity grant from Trinity College, Dublin, subject to a rent of £1836, for £52,423. Under the provisions of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851, this rent was variable every ten years, in accordance with a scale of prices laid down in the Act; but at the time of the sale there was no present probability of a variation. After payment of outgoings *C.* had had a profit rent of £117. The tenants' rents were practically second term judicial rents. *C.* applied to have the redemption price of the perpetuity rent fixed. Evidence was adduced as to the market value of head rents:—*Held*, by Meredith, J., applying the principles laid down in *In re Leader's Estate* ([1904] 1 Ir. R. 368) and *In re Kemmis' Estate* ([1904] 1 I. R. 496), and taking into consideration all the circumstances of the case—including (*a*) the fact that the rental was a second term rental; (*b*) the poor law valuation; (*c*) the price which *C.* obtained from his tenants; (*d*) the evidence as to the sale of agricultural rents in Ireland; (*e*) the value of money; (*f*) the fact that the redemption was compulsory; (*g*) the liability of the rent to variation; and (*h*) the fact that non-payment of the rent would have resulted in a gain to Trinity College, Dublin, through the eviction of *C.*—that the redemption price should be fixed at £45,000. *Held*, further, that (*h*) was not to be made the measure of the compensation. *Held*, further, that the fact that Trinity College, Dublin, must utilize the redemption money as an income-producing fund was not a special circumstance to be taken into consideration. *Held*, further, that the existence of the indemnity grant to Trinity College, Dublin, under section 39 of the Irish Land Act, 1903, did not diminish the redemption price which Trinity College, Dublin, was entitled to. *Held*, further, that the value should be ascertained as at the date of the order attaching claims to the purchase-money, under section 24 (1). *Held*, by the Court of Appeal, that the order of Meredith, J., should be affirmed. The price to be paid for a superior interest on redemption is the amount which will enable the owner to purchase an investment equally secure, which will produce an income equal to that of the superior interest, together with a small addition by reason of the redemption being compulsory. But in determining what is the nature of the security afforded by the superior interest, the Court will not treat the income derived therefrom as a perpetual annuity charged upon the purchase-money, but will value the estate in the lands sold, of which the owner of the superior interest was possessed at the moment of the sale. The special circumstance that Trinity College is bound to utilize the redemption price as an income-bearing fund should not influence the Court in ascertaining the money value of the rent. There is no rule of law that the number of years' purchase to be paid for such a rent as that payable to the College, where a sale is within the zones, must be at least as many as the owner of the mesne interest received upon his net income upon the sale to his tenants. *Leader's Estate* ([1904] 1 I. R. 368) explained. *In re Close's Estate.* MEREDITH, J., 207; APP. 371

LAND LAW (IRELAND) ACTS—*continued.*

5. —— *Statutory condition—Tenancy subject to—Opening house for sale of intoxicating liquors—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 5.] *J. M.* was tenant to the plaintiff of a farm of land held under a judicial tenancy, and there was a spirit license attached to the dwelling-house on the farm. The fair rent for the second statutory term was fixed in July, 1897. *J. M.* died in 1898, leaving a daughter, and a son (the defendant) then in America. The daughter obtained letters of administration to her father in 1898, and obtained a transfer of the license into her own name. In June, 1904, the daughter died without having administered her father's assets. She made a will, but did not appoint an executor. The defendant, having returned from America, entered into possession of the premises, and applied for and obtained, at the Annual Licensing Sessions in October, 1904, a transfer of the license, subject to representation being raised by him to his deceased sister. In December, 1904, the plaintiff obtained an order for a writ of *certiorari* to quash the order transferring the license to the defendant. At the Quarter Sessions in January, 1905, the defendant, without asking the plaintiff's consent, obtained a certificate for a new license, notwithstanding the plaintiff's objection. *Held* (reversing the decision of the Master of the Rolls), that, upon the order of October, 1904, transferring the license, being quashed, the house ceased to be licensed; that obtaining a new license for the premises was "opening a publichouse" within the meaning of sect. 5, sub-sect. 6, of the Land Law (Ireland) Act, 1881; and that the plaintiff was entitled to an injunction to restrain the defendant from keeping the house open as a publichouse. *Barton* v. *M'Fadden* - - - - - APP. 472

6. —— *Tenancy—Real or fictitious—Tenancy created for purposes of sale*—Bona fide *tenant—Untenanted land—Insolvent estate.*] Untenanted lands, held under lease, and forming part of an insolvent estate, were divided into lots and put up for sale, subject to the approval of the Land Judge, each lot being subject to a rent fixed by the Receiver. In the particulars it was stated that "each lot offered for sale consists of a yearly tenancy pending the matter, to be created under the Court, together with the benefit of an agreement to

LAND LAW (IRELAND) ACTS—*continued.*
be entered into for the purchase of the fee-simple under the Land Purchase Acts, at a price fixed at twenty-three years' purchase of the rent of the tenancy." Immediately after the sale the buyer of each lot signed a memorandum, by which he proposed and agreed to become tenant from year to year under the Court upon the terms specified, and further agreed (in case his proposal was accepted by the Judge) to purchase the lands in fee-simple under the Land Purchase Acts at the price mentioned. Upon the matter coming before the Land Judge for his approval, he refused to sanction the proposals for tenancies or agreements to purchase, as the proposed tenancy in each case was a mere fiction, the purchaser of each lot becoming in equity, under the contract, the purchaser of the fee-simple at the same moment as he became tenant. *Goodbody's Estate* (32 I L.T.R. 87) approved and followed. *In re Rynd's Estate* [Ross, J., 363

—— Conditions of sale—Mortgagee of tenancy—Arrears of rent—59 & 60 Vict. c. 47, s. 16
See CONDITIONS OF SALE. 1. [401

—— Investment of purchase-money—Trust 532,
See PUBLIC TRUSTEE. [546

——Reservation of sporting rights—Injunction
See FISHERY. 1, 2. [245, 434

—— Ulster tenant right - - 288, 607
See ULSTER TENANT RIGHT.

LANDLORD AND TENANT—Creation of tenancy for the purpose of sale—Untenanted lands—Insolvent Estate 363
See LAND LAW (IRELAND) ACTS. 6.

—— Land Law (Ireland), Land Purchase, and Irish Land Acts.
See LAND LAW (IRELAND) ACTS.

—— Lease.
See LEASE.

—— Sale by mortgagee of tenancy—Conditions—Arrears of rent - - - 401
See CONDITIONS OF SALE. 1.

—— Ulster tenant right custom—Subletting—Unreasonable conduct - 288, 607
See ULSTER TENANT RIGHT.

LAND PURCHASE ACTS.
See LAND LAW (IRELAND) ACTS.

LEASE—Assignment without consent of landlord—Marriage settlement—Covenant for further assurance - - - 1
See COVENANT FOR FURTHER ASSURANCE.

—— Assignment without consent of landlord—Statute of Limitations—Covenants 1
See LIMITATIONS, STATUTE OF. 1.

—— Ecclesiastical—*Toties quoties* covenant to renew in sub-lease—Purchase of fee by sub-lessor - - - 186, 199
See COVENANT TO RENEW.

LEASE—*continued.*

—— Implied grant of easement—Contemporaneous parol agreement—Condition, user, and circumstances of demised premises 154, 174
See WAY.

—— Of recent date—Root of title—Misleading condition - - - - 85, 98
See CONDITIONS of SALE.

—— Title to tenancy acquired by Statute of Limitations—Covenants in lease - 1
See LIMITATIONS, STATUTE OF. 1.

LEGACY—Description of legatee—Latent ambiguity - - - - - 353
See AMBIGUITY.

—— Operation of statute of limitations—Whether from death of testator or twelve months after - - - - 416, 428
See LIMITATIONS, STATUTE OF. 2.

—— To be distributed as legatee thinks right 51
See SECRET TRUST.

LEGAL ESTATE—Executor—Realty—Power of sale - - - - - 269
See EXECUTOR. 1.

LIMITATIONS, STATUTE OF—*Leasehold—Possession*—3 & 4 Wm. 4, c. 27, s. 34—*Covenants.*] The effect of the Statute of Limitations upon the position of a person in possession of leaseholds (not an assignee) is not to transfer to him the interest of the lessee, and make him bound by the covenants in the lease, but merely to give him the right of possession during the remainder of the lease against the lessee or those claiming under him. *Tickborne* v. *Weir* (67 L. T. (N.S.) 735) followed. *Rankin* v. *M'Murtry* (24 L. R. Ir. 290) considered. *O'Connor* v. *Foley* - - - - M.R. 1

2. —— *Legacy—Accruer of right—Death of testator*—37 & 38 *Vict. c.* 57, *s.* 8.] In an action to recover a legacy the period of limitation is twelve years from the death of the testator, not from the expiration of one year after his death. Decision of the Master of the Rolls *contra* reversed in the Court of Appeal. *Waddell* v. *Harshaw* [M.R. 416; APP. 428

3. —— *Mortgage—Claim upon covenant—Amount of interest recoverable*—3 & 4 *Wm.* 4, *c.* 27, *s.* 42—37 & 38 *Vict. c.* 57, *s.* 8—*Acknowledgment—Payment of interest—Administration action—Decree.*] In 1858 *A* borrowed a sum of money from the trustees of a settlement on the security of a charge on the lands of *X*. *A* having died in 1887, a decree for the administration of his real and personal estate was made in an action brought by *B*, his executrix, against *C*, his eldest son and one of his next-of-kin. No claim was made by the mortgagees in the action, which, by consent, was not proceeded with. Interest on the mortgage debt was paid out of the lands of *X* down to 1895 by *B*, who died in 1892, and afterwards by *C*, who was executor of *B* and owner of the charge. The lands having proved insufficient

LIMITATIONS, STATUTE OF—*continued.*
to pay the interest, application to revive the action was made by the trustees of the settlement, in order to prove for principal and interest under the covenant. *C*, the defendant, objected that the claim was barred by the Statute of Limitations:—*Held*, that, although the decree did not prevent the statute from running, the payment of interest kept the debt alive; but that only six years' arrears of interest were recoverable, it being a sum of money chargeable upon land within 3 & 4 Wm. 4, c. 27, s. 42. An order was accordingly made to continue the proceedings in the name of *C*, executor of *B*, as plaintiff, and of the trustees as co-defendants with the defendant *C*. *Thompson* v. *Hurly* [M. R. 588

4. —— *Order for sale—Conditional order—Date from which operation of statute is suspended—Practice, Land Judge.*] The order for sale which prevents the operation of the Statute of Limitations in respect of an estate in the Land Judge's Court (within the rule laid down in *Colclough's Estate*, 8 Ir. Ch. R. 330) is the absolute order, and not the conditional order. *In re Smith's Estate; Whitestone and Harrison, Petitioners* (No. 2) [Ross, J., 460

LOST DEED—Evidence of contents 60, 74
See Estate for Life.

MANOR—Adjoining the sea—Patent—Foreshore
See Seashore. [483, 509

MARRIAGE—Articles—Limitations to children
See Executory Settlement. [465

—— Condition in restraint of - - - 45
See Condition in Will.

—— Settlement.
See Settlement.

MASSES—Gift for - - - - - 119
See Monastic Order.

MEMORIAL—Evidence of lost deed 60, 74
See Estate for Life.

MONASTIC ORDER — *Will — Construction — Gift for Masses, validity of—Pious use—Perpetuity —Charge on land—Chattel real—Personalty—Death of testator within three months next after execution of will—Charitable Donations and Bequests Act* (7 & 8 *Vict. c.* 97), *s.* 16—*Catholic Relief Act* (10 *Geo.* 4, *c.* 7).] A testator (who died within three months from the date of the execution of his will) directed his interest in a farm of land to be sold, and out of the proceeds of the sale a sum of £200 to be set apart and given to the parish priest and curates of Cahir Roman Catholic Church to be invested by them; the principal to remain invested for all time in the names of the successive parish priests and curates of Cahir, the interest thereof to be applied in saying Masses for the repose of testator's soul. After bequeathing a pecuniary legacy, the testator gave the rest, residue, and remainder of his property to the Abbot of *M.*, and the Franciscan Friars in

MONASTIC ORDER—*continued.*
C. in equal shares for the purpose of having Masses said for the repose of his soul in *M.* and *C.* At the dates of the execution of the will, and of the death of the testator, the same person was Abbot of *M.*, and the same three Franciscan Friars were resident in *C.*:—*Held*, (1) that the legacy of £200 was void as a charge upon lands under sect. 16 of the Charitable Donations and Bequests Act (7 & 8 Vict. c. 97):—*Held*, (2) (in reference to the gift of the residue so far as it consisted of pure personalty) (*a*) that there was a gift of one-half to the person who filled the office of Abbot of *M.* at the date of testator's death in his individual capacity for the offering up of Masses, and that same was valid; (*b*) that there was a gift of the other half for the offering of Masses to a specified body, because they were members of the Order of Franciscan Friars bound by monastic vows, which was void as contrary to the policy of the Catholic Relief Act (10 Geo. 4, c. 7). *Burke* v. *Power* - - - M. R. 119

MORTGAGE—Covenant—Claim in administration action—Acknowledgment—Amount of interest recoverable - - 588
See Limitations, Statute of. 3.

—— Of assets by administrator - 406, 409
See Executor.

—— Of tenancy—Conditions—Arrears of rent
See Conditions of Sale. 1. [401

NAME—Latent ambiguity—Will - - 353
See Ambiguity.

ORDER FOR SALE—Land Judge—Conditional order—Statute of Limitations - 460
See Limitations, Statute of. 4.

PARENTAL CONTROL—Security given under —Absence of professional advice 296
See Undue Influence.

PATENT FROM THE CROWN — Foreshore —Manor—User - - 483, 509
See Seashore.

PERPETUITY—Gift for masses - 119
See Monastic Order.

—— Will—Annuity - - - 454, 459
See Annuity.

PERSONA DESIGNATA— Will — Construction - - - - - - - 119
See Monastic Order.

PETITION FOR SALE—Dismissal—Practice, Land Judge - - - - 413
See Tenant for Life and Remainderman.

PIOUS USE—Masses—Proceeds of sale of land—Death of testator within three months of execution of will - - - 119
See Monastic Order.

PORTION — Settlement — Failure of trust — Resulting trust - - - 252
See Resulting Trust.

POWER—Or property - - - 147
See ABSOLUTE GIFT.
—— Sale of real estate—Executor—Will—Construction - - - - - 269
See EXECUTOR.
—— Testamentary—Release of—Deed inconsistent with exercise of - - - 60, 74
See ESTATE FOR LIFE.
PRACTICE—Appeal—Land Commission—Judicial Commissioner - - - 570
See LAND LAW (IRELAND) ACTS. 3 (*b*).
—— Land Judge—Conditional order for sale—Statute of limitations - - - 460
See LIMITATIONS, STATUTE OF. 4.
—— Land Judge—Dismissal of petition—Tenant for life—Consent of incumbrancers—Opposition of remainderman - 413
See TENANT FOR LIFE AND REMAINDERMAN.
—— Staying proceedings—Plaintiff an arranging debtor - - - - - 25
See ARRANGING DEBTOR.
—— Summons—Vendor and purchaser—Allegation of fraud - - - - 602
See REQUISITIONS ON TITLE.
PROFESSIONAL ADVICE — Absence of — Security given under parental control 296
See UNDUE INFLUENCE.
PUBLICHOUSE—Judicial tenant — Statutory condition - - - - 472
See LAND LAW (IRELAND) ACTS. 5.

PUBLIC TRUSTEE — *Trust* — *Investments* — *Urban district stock—Foreign railways* — *Ordinary stock of railway company—Irish Land Act*, 1903, *s.* 51.] The stock issued under the regulations of the Local Government Board (20th February, 1892) by an urban district council is a mortgage secured upon the rates or taxes levied, under the authority of an Act of Parliament, by a local authority within the meaning of sect. 51 (1) (a) of the Irish Land Act, 1903, and purchase-money of settled land purchased by means of an advance under the Land Purchase Acts may, pursuant to that section, be invested therein, subject to the proviso in clause (f). The £10 shares of a tramway company, the interest on which at £5 per cent. is guaranteed by specified portions of two counties, £2 per cent. being refunded to the counties by the Treasury, are authorised by clause (d) of the same section for the investment of such purchase-money, subject to the proviso in clause (f). Debenture stock of a company incorporated and registered under the English Companies Acts for the purpose of holding and working a railway in a foreign country, which, for the ten years immediately preceding the date of investment, has paid a dividend on its ordinary shares, is authorised by clause (f) of the same section for the investment of such purchase-money, subject to the proviso

PUBLIC TRUSTEE—*continued.*

in the same clause. But the debenture stock of foreign railways owned by companies not so registered is not authorised as an investment of such purchase-money. The ordinary fully-paid stock of a railway company in this country, which has paid a dividend thereon for the ten years immediately preceding the date of the investment, is authorised by clause (f) for the investment of such purchase-money, subject to the proviso in that clause (FitzGibbon, L.J., *diss.*). The proviso in clause (f) requires that the sufficiency of any of the investments enumerated in the earlier part of sect. 51 to realise the sum invested therein upon the death of the tenant for life or the termination of the trust, shall be established to the satisfaction of the Public Trustee. *The Public Trustee* v. *Blacker-Douglas*
[M. R. 532; APP. 546

REAL ESTATE — Implied power of sale — Executor - - - - 269
See EXECUTOR.
REDEMPTION—Superior interest 207, 371
See LAND LAW (IRELAND) ACTS. 4.
REGISTRATION OF DEED — Memorial — Evidence - - - - 60, 74
See ESTATE FOR LIFE.
RELEASE — Power — Deed inconsistent with exercise of - - - - 60, 74
See ESTATE FOR LIFE.
RENEWABLE LEASE.
See COVENANT TO RENEW.
RENTCHARGE.
See ANNUITY.

REQUISITIONS ON TITLE — *Vendor and purchaser—Threatened litigation — Jurisdiction—Summons.*] A purchaser having inquired whether the vendor or her solicitor was aware of any proceedings to set aside a deed on which the title depended, the reply was that no proceedings had been taken or threatened to set aside the deed. It appeared that in a probate action to establish an alleged will of the grantor in the deed (which will purported to dispose of the subject-matter of the contract) the vendor, who was the defendant, on an application for security for costs, made an affidavit alleging that she had evidence showing that the testator was mentally incapable at the date of the will. The plaintiff made default in giving security, and the action was stayed. After the contract the plaintiff employed another solicitor, who wrote to the purchaser's solicitor, threatening to impeach the deed on the ground of fraud:—*Held*, that the requisitions had been sufficiently answered and a good title shown in accordance with the particulars and conditions of sale. Questions of fraud cannot be entertained on a vendor and purchaser summons. *In re Delany and Deegan's Contract* - - M. R. 602

RESTRAINT ON ALIENATION — Validity *See* SETTLEMENT. [261

RESULTING TRUST—*Settlement—Failure of trusts—Marriage portion.*] A father, on the marriage of his daughter, *C.*, paid over to the trustees of the settlement a sum of £800, upon trust for the husband and his wife, *C.*, for their lives and the survivor for life, with remainder to the children of the marriage; and if the wife should die leaving the husband surviving, and there being no children, to pay said sum to the husband. The father also covenanted, after securing to each of his children not yet provided for a like sum of £800, to dispose of the residue of his property, so that, on the death of himself and his wife, it should be divided equally among his surviving children, and the share of the said *C.* should be and enure to the like trusts, intents, and purposes, as were expressed concerning said sum of £800. In the event of the husband not surviving *C.*, and there being no issue (which happened), there was no trust expressly declared in the settlement concerning the trust property. By his will the father bequeathed the residue of his property in accordance with the terms of the covenant:—*Held*, that £800 should be regarded as a marriage portion, given by the father to his daughter *C.* on her marriage, as a provision for her, and that *C.* took both the £800 and the share of her father's residue absolutely, there being a resulting trust in her favour. *Ward* v. *Dyas* (Ll. & G. *temp.* Sugden 177) followed. *Doyle* v. *Crean* - - BARTON, J., 252

—— Settlement—Construction - - 60, 74

See ESTATE FOR LIFE.

SEASHORE — *Patent—User — Admissions*—Ex diuturnitate temporis omnia præsumuntur rite esse acta.] The foreshore may constitute a part of a manor which adjoins the sea, and consequently may pass from the Crown by a grant of the manor, although the technical words to describe it be absent. When a patent contains words under which foreshore may pass, it may be shown by user that a particular part only of the foreshore passed, although it be clear that other parts did not pass, or although it be left uncertain whether such other parts did or did not pass. Where a patent, though omitting technical words, contains words under which foreshore may pass, and where there have been proved, affecting part of the foreshore of the manor, several acts of ownership, open, notorious, and long persevered in on the part of the grantee of a manor under a patent, though each of such acts would have been an act of trespass or encroachment if that part of the foreshore had not passed by the patent, the proper course is to attribute all such acts of ownership to a legal origin and not to usurpation, and to hold that such part of the foreshore passed by the patent. *Vandeleur* v. *Glynn and the Attorney-General*

[M.R. 483; APP. 509

SECRET TRUST—*Will—Gift to legatee "to be distributed as he thinks right"—Beneficial interest—Beneficiary under secret trust an attesting witness of will—Wills Act* (1 *Vict. c.* 26), *s.* 15.] A testator bequeathed personalty to *O.*, "to be distributed as he thinks right." He appointed no executor. *O.* was the person who prepared testator's will, and was verbally informed at the time of the execution thereof by testator that he wished him to do "as he thought fit with the money, to distribute it, after payment of debts, &c.," among five named persons, of whom *B.* (one of the next-of-kin) was one. *O.* accepted the trust:—*Held*, that *O.* was, under the terms of the will, entitled for his own benefit; but that as a secret trust had been accepted by him, he took on a trust enforceable by the Court for the beneficiaries named by the testator. *B.* was a witness to the will:—*Held*, that she was not thereby incapacitated from taking a benefit under the secret trust. *Re Fleetwood* (15 Ch. D. 594) on this point not followed. *O'Brien* v. *Condon*

[M.R. 51

SETTLEMENT—*Construction—Life estate and remainder in fee to husband—Gift over on insolvency or alienation—Effect of.*] By a marriage settlement the husband's lands were settled upon trust to pay to him the rents, &c., during the term of his natural life, "except in the events hereinafter stated"; and after his death, subject to an annuity for his wife, upon trust for the husband. The wife's lands were settled upon trust to pay the rents to her for her life, and after her death in case her husband should survive her and leave children of the marriage living (which event happened), upon trust to pay the rents to the husband during his life, "except in the events hereinafter provided"; and after the death of the survivor, upon trust for the children of the marriage, as the husband and wife should jointly appoint; and in default thereof, in equal shares. The settlement contained a proviso that in case the husband should, during the lifetime of his wife or any of the children, incumber the lands, or become bankrupt or insolvent, the lands should remain vested in the trustees, upon trust for the wife for life, and after her death in trust for the children of the marriage, as was thereinbefore expressed concerning the wife's lands. There were several children of the marriage. The husband carried an arrangement with his creditors. Part of the husband's property included in the settlement was the sub-lessee's interest in the lands of *B.*, held for lives renewable for ever, and also the lands of *M.*, held in fee-simple. The husband purchased the interest of the sub-lessor, and accepted a fee-farm grant from the head lessor. The husband mortgaged to the Hibernian Bank his interest in *B.* and *M*:—*Held*, that in the events which happened, the gift over took effect, not only as regarded the life estate,

SETTLEMENT—*continued.*
but also as regarded the estate in remainder. *In re Walsh's Estate*; *Greenwood & Drury, Petitioners* [Ross, J., 261
—— After-acquired property—Gift from husband to wife - - - - - - 272
See COVENANT TO SETTLE.
—— Articles—Limitation to children - 465
See EXECUTORY SETTLEMENT.
—— Estate *pur autre vie* — Construction — *Cestui que* trust whether taking in fee or for life only - - - - - - 60, 74
See ESTATE FOR LIFE.
—— Lease subject to 7 Geo. 4, c. 29—Consent of landlord not obtained—Covenant for further assurance - - - - - 1
See COVENANT FOR FURTHER ASSURANCE.
—— Portion—Failure of trust — Resulting trust
See RESULTING TRUST. [252
SPORTING RIGHTS—Reservation of—Interference with—Injunction - 245, 434
See FISHERY. 1, 2.
STATUTES:—
7 Geo. 4, c. 29—Landlord and tenant, s. 3 1
See COVENANT FOR FURTHER ASSURANCE.
LIMITATIONS, STATUTE OF. 1.
10 Geo. 4, c. 7—Catholic Relief - - 119
See MONASTIC ORDER.
3 & 4 Wm. 4, c. 27—Statute of Limitations, s. 34
See LIMITATIONS, STATUTE OF. 1. [1
—— —— s. 42 - - - - - - 588
See LIMITATIONS, STATUTE OF. 3.
4 & 5 Wm. 4, c. 61—Bridges - 307, 330
See BRIDGE.
1 Vict. c. 26—Wills, s. 15 - - - 51
See SECRET TRUST.
7 & 8 Vict. c. 97— Charitable Donations and Bequests - - - - - - 119
See MONASTIC ORDER.
13 & 14 Vict. c. 29—Judgment mortgage, s. 6
See CLOUD ON TITLE. [124
30 & 31 Vict. c. 50—Bridges - 307, 330
See BRIDGE.
32 & 33 Vict. c. 42—Irish Church, ss. 12, 34
See COVENANT TO RENEW. [186, 199
33 & 34 Vict. c. 46—Landlord and tenant, ss. 1, 2, 18 - - - - - - 288
See ULSTER TENANT RIGHT.
37 & 38 Vict. c. 57—Limitations, s. 8 416, 428,
See LIMITATIONS, STATUTE OF. 2, 3. [588
38 & 39 Vict. c. 46—Bridges - 307, 330
See BRIDGE.
44 & 45 Vict. c. 49—Land Law, s. 5 245, 434,
See FISHERY. 1, 2. [472
LAND LAW (IRELAND) ACTS. 5.
—— —— ss. 21, 57 - - - 288, 607
See ULSTER TENANT RIGHT.
59 & 60 Vict. c. 47—Land Law, s. 16 - 401
See CONDITIONS OF SALE. 1.
STATUTES—*continued.*
3 Edw. 7, c. 37—Irish Land, s. 1, sub-s. (1)(*a*) [236, 570
See LAND LAW (IRELAND) ACTS. 3.
—— —— sect. 5, sub-sect. (1) - - 448
See LAND LAW (IRELAND) ACTS. 2.
—— —— sect. 5, sub-sect. (6) - - 472
See LAND LAW (IRELAND) ACTS. 5.
—— —— sect. 12, sub-sect. (1) - - 597
See LAND LAW (IRELAND) ACTS. 1.
—— —— sect. 24, sub-sect. (12) - 236, 570
See LAND LAW (IRELAND) ACTS. 3.
—— —— sect. 43, sub-sect. (3) - - 597
See LAND LAW (IRELAND) ACTS. 1.
—— —— sect. 51 - - - 532, 546
See PUBLIC TRUSTEE.
SUBLETTING—Ulster tenant right 288, 607
See ULSTER TENANT RIGHT.
SUPERIOR INTEREST — Redemption — Assessment of price - - 207, 371
See LAND LAW (IRELAND) ACTS. 4.
TENANT FOR LIFE AND REMAINDERMAN—*Practice, Land Judge's Court—Dismissal of petition on application of tenant for life—Consent of incumbrancers — Opposition by remainderman.*] Where the owner, a tenant for life, with the consent of the incumbrancers, or on his undertaking to pay them off, applies to have a petition for sale dismissed, the application may be granted notwithstanding the opposition of the remainderman. *In re Marquis of Ely's Estate* - Ross, J., 413
TENANTS IN COMMON— Marriage articles
See EXECUTORY SETTLEMENT. [465
THREATENED LITIGATION—Vendor and purchaser—Requisitions - - 602
See REQUISITIONS ON TITLE.
TITLE—Cloud on - - - - - 124
See CLOUD ON TITLE.
—— Condition stating defect - - - 280
See CONDITIONS OF SALE. 3.
—— Requisitions - - - - - - 602
See REQUISITIONS ON TITLE.
TOLLS—Bridge—Interference with 307, 330
See BRIDGE.
TRUST—Breach of trust — Delegation—Conditions of sale - - - - - 280
See CONDITIONS OF SALE. 3.
—— Investment—Purchase-money of land—Irish Land Act, 1903, s. 51 - 532, 546
See PUBLIC TRUSTEE.
—— Resulting - - - - - - 252
See RESULTING TRUST.
—— Secret - - - - - - - 51
See SECRET TRUST.
ULSTER TENANT RIGHT — *Landlord and tenant—Land Law (Ireland) Act, 1881, ss. 21, 57—Bona fide occupation—Subletting—Compensation.*] The proviso in section 21 of the Land Law (Ireland) Act, 1881, enabling a person who would have been

ULSTER TENANT RIGHT—*continued.*
entitled to make a claim for Tenant Right, under sections 1 and 2 of the Land Act, 1870, if the holding had been held under a yearly tenancy, to do so on the termination of an existing lease, is not restricted to the case of a lessee in *bona fide* occupation of the holding. A lawful subletting of part of a holding will not necessarily deprive a tenant of his right to compensation for Tenant Right; but in estimating the amount of compensation, regard is to be had to the fact that portion of the holding was not in the occupation of the tenant. In estimating the amount of compensation for Tenant Right upon the expiration of a lease, it cannot be estimated on the basis of a rent less in amount than the rent payable under the lease, especially where the lessee was not in *bona fide* occupation of the entire holding at the expiration of the lease, and was consequently not entitled to have a fair rent fixed. Decision of Fitz Gerald, J., affirmed by the Court of Appeal. *Nicholson, Landlord*; *Executors of Smyth and others, Tenants* FITZ GERALD, J., 288; [APP. 607

UNDUE INFLUENCE — *Mortgage — Unfair transaction—Setting aside.*] Beneficiaries under a settlement were induced by relatives, by whom they had been brought up, to sign promissory notes given by the relatives to a creditor, and under pressure of legal proceedings to assign their interest in the settled lands, which were in the possession of the relatives, to enable them to mortgage the lands to the creditor. The beneficiaries were only just of age, ignorant of their rights, and without any effective legal advice:—*Held*, that the transaction was procured by undue influence, and was unfair, and that the assignment and mortgage should be set aside. *O'Connor* v. *Foley* - - - - - - - M. R. 1

2. —— *Mother and daughter—Attainment of age by latter — Dealing with daughter's property — Parental control—Absence of professional advice.*] *M.* died intestate, being possessed of real estate and personalty, including leasehold lands, leaving a widow and one daughter under age. The widow took out administration, and deposited the lease of the leaseholds with a Bank as security for an overdraft and for money advanced on bills. The Bank had full knowledge of the insolvent condition of the widow's affairs and of the daughter's age and circumstances. A few days before the daughter came of age the Bank, deeming the security insufficient, applied peremptorily to the mother for payment. At an interview with the managing director, shortly after the daughter came of age, the mother offered to secure payment of the overdraft by a joint promissory note of herself and her daughter. The daughter, who was present, being asked to join, expressed her willingness by saying "Yes." Some time afterwards the Bank again

UNDUE INFLUENCE—*continued.*
pressed the mother for payment, but consented to allow a short extension of the time for payment if the mother and daughter signed a joint promissory note, payable on demand, for the entire debt. Two promissory notes for the amount were prepared by the Bank, and signed by the mother and daughter. The local manager stated in evidence that on the occasion of the signing of the notes he explained to the daughter that she would be liable for the whole amount, and that, in the event of the failure to pay the debt on the part of her mother, the Bank would look to her; and that the daughter replied that she understood all that. She had not, on this or any other occasion, independent professional advice. The Bank recovered judgment against the daughter, and registered it as a judgment mortgage upon her lands:—*Held*, that the judgment should be declared void as against the daughter. *M'Mackin* v. *Hibernian Bank* BARTON, J., 297

UNTENANTED LANDS — Creation of tenancies for the purpose of sale - 363.
See LAND LAW (IRELAND) ACTS. 6.

USER—Acts of ownership—Foreshore—Patent
See SEASHORE. [483, 509

VARIABLE RENT—Superior interest — Redemption - - - - 207, 371
See LAND LAW (IRELAND) ACTS. 4.

VENDOR AND PURCHASER — Conditions of sale - - - 85, 98, 280, 401
See CONDITIONS OF SALE. 1–3.

—— Land Purchase Acts.
See LAND LAW (IRELAND) ACTS.

—— Requisitions on title—Threatened litigation
See REQUISITIONS ON TITLE. [602

VESTING OF ESTATE—Arranging debtor—Staying action - - - - 25
See ARRANGING DEBTOR.

WAY—*Easement—Necessary for convenient user of tenement—No defined path—Door—Lease—Implied grant—Derogation.*] The defendant, an owner of building ground on which he had erected houses, demised one of them, with the garden thereto attached, to the predecessor of the plaintiff. In the rear wall of the garden was a door opening on the defendant's ground. This ground was to a large extent waste, being used in part for storing building materials, and in part for growing vegetables. It was surrounded by a wall, in which were two gates opening on public passages. These gates were kept locked, the keys being in the possession of the defendant. There was no defined path from the door to either gate. At the time of the demise the defendant gave the lessee a key of the back door, to enable him to bring in coals. The lessee wanted to get a right of way, but the defendant told him he could not give a right of way, but he would allow him to bring in coals by the back door. The lessee had since brought his coals

WAY—*continued.*
through the door, the gates being opened by the defendant for the purpose on each occasion. There was no other way by which coals could be brought to the house except by the hall door. The place in which coals were stored was at the back of the house, approached by a path laid in concrete leading through the garden from the back door:—*Held*, on appeal (reversing the decision of Barton, J.), that, having regard to the evidence as to the conversation between the parties thereto at the date of the letting, and the giving of the key by the defendant to the lessee, and also the condition, user, and circumstances of the demised premises, the lease was made by the defendant to the lessee upon the terms that during its continuance the occupiers of the house thereby demised should have the right to use the door opening from the demised premises into the defendant's land, for the purpose of bringing in coal for the use of the inhabitants of the house, with the further right of passing and repassing, for the purpose aforesaid, across the defendant's land between the door and one of the adjoining public highways, by such route and through such gate leading to either of such highways as the defendant might from time to time point out. *Donnelly* v. *Adams* [Barton, J., 154; App. 174

WILL—Annuity, whether for life or perpetual.
See Annuity. [453, 459

—— Condition in restraint of marriage—Contingent gift—Intermediate income - 45
See Condition in Will.

—— Legacy—Accruer of right - 416, 428
See Limitations, Statute of. 2.

WILL—*continued.*

—— Life estate to wife—After her death sale of portion of assets to pay legacies—Balance to be disposed of according to her wishes
See Absolute Gift. [147

—— Name of legatee—Latent ambiguity — Extrinsic evidence - - - 353
See Ambiguity.

—— Pious use—Proceeds of sale of land—Death of testator within three months of execution of will—Monastic order — *Persona designata* - - - - 111
See Monastic Order.

—— Power of sale—Real estate—Executor 269
See Executor.

—— Secret trust—Beneficiary attesting witness—
See Secret Trust. [51

WINDING UP — Debentures — Security for advances—Interest—Proof - 112
See Interest on Money.

—— Directors — Liability for costs of inquiry occasioned by their misfeasance not involving pecuniary loss - - 133
See Directors.

WITNESS — Attestation of will — Beneficiary under secret trust - - - 51
See Secret Trust.

WORDS—"Balance to be disposed of according to the wishes of my wife"—Will 147
See Absolute Gift.

—— "Subject to a judicial rent"—3 Edw. 7, c. 37, sect. 1, sub-sect. (1) (a) - 236, 570
See Land Law (Ireland) Acts. 3.

—— "To be distributed as he thinks fit"—Will
See Secret Trust. [51

THE END.